



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

GIFT OF

Thomas M. Storke,
Regent

wen

Bowen & Bowen.

LEADING CASES

UPON

THE LAW OF TORTS

SELECTED BY

GEORGE CHASE, LL.B.

PROFESSOR OF LAW IN THE NEW YORK LAW SCHOOL, NEW YORK CITY, AND
DEAN OF THE LAW FACULTY

ST. PAUL, MINN.
WEST PUBLISHING CO.

1892

T
C 3864 L
1892

COPYRIGHT, 1891,
BY
WEST PUBLISHING COMPANY.

B. J. F.
2/15/56

2872 1586 1886

PREFACE.

THIS collection of cases upon the Law of Torts is intended to supplement and illustrate the statements of legal principles which are set forth in the various treatises upon this subject. Object lessons, showing the application of principles, are as efficacious in the study of law as in the study of other branches of learning, and such lessons are afforded by the actual decisions made by the courts in specific instances. Such decisions may also exhibit the growth and development of legal doctrines. This is not teaching law solely by the reading of cases, but rather using the cases for the purpose of illustration, which the editor believes to be the most useful and beneficial method. The aim has been to select the most valuable and important cases that could be found, giving a comprehensive view of the particular point or question discussed, and presenting the actual living law of to-day as the result of the long process of adjudication in England and in this country. Hence the volume comprises modern cases to a large extent, and in some instances these are among the most recent that have been issued. This fact, it is believed, will render the book of service both to law students and to practitioners.

A word of caution may be addressed to law students in regard to the study of cases. A student should remember carefully that judicial decisions, though they may be "leading cases" and the most valuable that can be found, may nevertheless contain *dicta*, and that he must discriminate between *dicta* and the points actually decided. Moreover, statements of general principles, as set forth in the decisions, are sometimes made too broadly, because the judge has his mind concentrated upon the questions involved in the particular case he has to decide, and does not think of the possible limitations which the doctrine may need to adapt it to analogous cases of varied character. Still, these sources of error are less likely to be found in a collection of leading cases, containing the opinions of judges of eminence, than in other instances. And, besides, the authors of the best text-books, in preparing their treatises, examine and compare the numerous and varied cases that bear upon the same points, and thus are able to set forth the principles of law in their true and accurate form, properly limited and classified. This is, again, another important reason for studying the text-books and illustrative cases together.

The cases are printed in the same general form in which they appear in the regular reports, viz., with head-notes, statements of facts, and sometimes arguments of counsel, prefixed to the opinions. Running head-lines in bold-faced type, also, direct the attention of the reader to the principle treated of in the particular case that follows. Numerous other valuable cases are also cited after each of those that are printed in full, so that the student or lawyer can extend his researches more widely, if he so desires. These cited cases are also among the most important authorities upon the various points discussed.

NEW YORK, October 12, 1891.

G. C.

(iii)*

TABLE OF CONTENTS.

General Principles, 1.

No tort committed, unless a legal right or legal duty is violated, 1.

The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort, 8.

Illustration of the establishment of legal rights by the common law, as, *e. g.*, in the decision of "cases of novel impression," 11.

Illustration of the creation of legal rights by statute, 16.

Injuria sine damno gives a right of action, 18.

Ex damno sine injuria non oritur actio, 23.

In some classes of cases, there must be damage sustained in order that there may be a cause of action for tort, 28.

In actions of tort, damages may be awarded for the proximate, but not for the remote, consequences of the tortious act—Nature of this distinction, 32.

Torts, as distinguished from crimes, do not, in general, involve a wrongful intent, 49.

Lunatics liable for torts, 50.

There is, however, no liability in tort for purely accidental injuries, 51.

An action upon tort lies for the breach of a right or duty created by law, even though the performance of such right or duty may have been assumed by contract. In such cases the plaintiff may either sue *ex contractu* or *ex delicto*, 54.

So a tort, as a violation of legal duty, may involve, as one of its elements, a breach of contract, 56.

In cases of contract, where no legal duty arises independent of contract, one not in privity with the defendant cannot recover against him in tort, 62.

But if, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort, 65.

In actions of tort against joint tort-feasors, the damages will not be apportioned, 68.

In general, no right of contribution exists between joint tort-feasors, 68.

Assault and Battery, 70.

Nature of an assault—Difference between a civil and a criminal assault, 70.

Effect of accompanying words indicating that there is no intent to do actual violence, 72.

Assault and Battery—Continued.

Nature of a battery, 72.

Effect of consent, 74.

Justifiable and excusable assaults and batteries, 75.

a. Self-defense—Defense of property, 75.

b. Rightful expulsion by carrier of passengers, 79.

c. Discipline of children, pupils, etc., 80.

d. Act of public officer in performance of official duty, 81.

False Imprisonment, 82.

What constitutes false imprisonment, 82.

Arrest upon void process, 88.

Arrest upon irregular process—Difference between “irregularity” and “error,” 90.

Arrest without warrant, where a warrant is by law necessary, 93.

a. In cases of felony, 93.

b. In cases of breach of the peace, 96.

Malicious Prosecution, 98.

Elements of Action—“Malice” and “probable cause” defined, 98.

Effect of advice of counsel, 101.

Termination of the proceeding, 102.

Malicious prosecution of a civil action, 104.

Malicious abuse of process, 107.

Conspiracy, 109.**Slander and Libel, 111.**

I. Slander, 111.

a. Slander *per se*, 111.

1. Charge of crime, 111.

2. Charge of certain contagious diseases, 116.

3. Charge affecting a man in his office, profession, trade, employment, etc., 116.

b. Slander with special damage, 121.

II. Libel, 124.

III. Malice in libel and slander, 128.

IV. Publication, 130.

V. Defense of “justification,” 132.

VI. Defense of “privileged communication,” 136.

1. Qualified privilege, 136.

2. Absolute privilege, 145.

VII. Construction of words—*Colloquium*—*Innuendo*, 147.

VIII. Slander of title, 149.

Trespass to Land, 150.

I. What constitutes a trespass, 150.

II. Trespass is an injury to the possession, 154.

Trespass to Land—Continued.

III. Trespass *ab initio*, 155.

IV. Trespass by joint tenant, 157.

V. Defenses:—License, necessity, etc., 157.

Nuisance, 164.

I. What constitutes a nuisance—Prescriptive right to maintain a nuisance—Injunction to restrain, 164.

II. Examples of nuisances, 170.

1. Drainage of surface waters, 170.

2. Diversion and detention of stream, 172.

3. Pollution of stream, 175.

4. Noise, 176.

5. Keeping dangerous substances, 178.

6. Obstruction of highway, 180.

III. Who responsible, 181.

IV. Private injury from public nuisance, 184.

V. Legalized nuisance, 186.

VI. Abatement of nuisance, 189.

Injuries by Animals, 191.**Trespass to Personal Property, 194.**

I. What constitutes a trespass, 194.

II. Is an injury to the right of possession, 196.

Conversion of Personal Property, 197.

I. What constitutes conversion, 197.

II. Is an injury to the right of possession, 201.

III. Conversion by joint owner, 202.

IV. Demand and refusal as evidence of conversion, 203.

Liability of Public Officers for Official Acts, 206.

I. Judicial officers, 206.

II. Ministerial Officers, 212.

Criminal Conversation and Seduction, 216.**Negligence, 219.**

I. Negligence gives a cause of action when it violates a legal duty, 219.

II. Liability for negligence contrasted with absolute liability, 221.

III. Contributory negligence, 223.

1. General principle, 223.

2. Negligence of plaintiff remote, 225.

3. Contributory negligence of children *sui juris*, 226.

4. Imputation of negligence to children *non sui juris*—Different theories, 228.

5. Imputation of negligence to passenger—Former English doctrine now overruled, 233.

6. Effect of acting under stress of peril to human life, 236.

Negligence—Continued.

IV. Liability of a master for the negligence of his servant, 237.

V. Liability of an employer for the negligence of a contractor, 240.

VI. Liability of master to his servant, 242.

Injury Causing Death, 247.**Fraud and Deceit, 249.**

I. Elements of action—Fraudulent intent, 249.

1. English rule, 249.

2. Massachusetts rule, 257.

II. Fraud by silence, 258.

III. False statements as to matters of opinion, 260.

IV. False statements as to patent or obvious defects, 263.

Conflict of Laws in Regard to Torts, 265.

CASES REPORTED.

	Page		Page
Adams, Forward v. (7 Wend. 204).....	116	Commissioners of Asbury Park, Ocean Grove Camp Meeting Ass'n v. (40 N. J. Eq. 447, 3 Atl. Rep. 168).....	26
Adams, Proctor v. (113 Mass. 376).....	159	Commonwealth v. Donahue (148 Mass. 529, 20 N. E. Rep. 171).....	77
Anthony, Brettun v. (103 Mass. 37).....	147	Commonwealth v. O'Malley (131 Mass. 423).....	77
Armory v. Delamirie (1 Strange, 505).....	201	Congreve v. Smith (18 N. Y. 79).....	180
Armstrong, Mills v. (L. R. 13 App. Cas. 1).....	233	Coolidge, Rice v. (121 Mass. 393).....	13
Armstrong County v. Clarion County (66 Pa. St. 218).....	68	Craddock, Boulware v. (30 Cal. 190).....	214
Ayers, Carl v. (53 N. Y. 14).....	94	Crosland v. Borough of Pottsville (126 Pa. St. 511, 18 Atl. Rep. 15).....	190
Baker, Moody v. (5 Cow. 351).....	44	Crow, State v. (1 Ired. Law, 375).....	72
Baltimore City Pass. Ry. Co. v. Kemp (61 Md. 619).....	54	Crown Point Iron Co., Larmore v. (101 N. Y. 391, 4 N. E. Rep. 752).....	219
Baltimore & P. R. Co. v. Jones (95 U. S. 439).....	223	Cutter, Fresh v. (73 Md. 87, 20 Atl. Rep. 774).....	136
Barholt v. Wright (45 Ohio St. 177, 12 N. E. Rep. 185).....	74	Danforth, Hager v. (20 Barb. 16).....	81
Barkley v. Wilcox (86 N. Y. 140).....	170	Davis v. Mann (10 Mees. & W. 545).....	235
Beach, Scribner v. (4 Denio, 448).....	75	Davis, Sawyer v. (136 Mass. 239).....	186
Beavan, Webb v. (11 Q. B. Div. 609).....	112	Delamirie, Armory v. (1 Strange, 505).....	201
Beecher, Moulton v. (1 Abb. N. C. 193).....	103	Delaware, L. & W. R. Co., Rounds v. (64 N. Y. 129).....	237
Bernina, The (L. R. 13 App. Cas. 1).....	233	Dennis, Frome v. (45 N. J. Law, 515).....	199
Bessey v. Olliot (T. Raym. 467).....	49	Derry v. Peek (L. R. 14 App. Cas. 337).....	249
Betts, Bump v. (19 Wend. 421).....	107	Devendorf, Weaver v. (3 Denio, 117).....	211
Bigauette v. Paulet (134 Mass. 123).....	216	Devlin, Morain v. (132 Mass. 87).....	50
Bird v. Jones (7 Adol. & E. [N. S.] *742).....	82	Dexter v. Cole (6 Wis. 320).....	195
Boland, Freeman v. (14 R. I. 39).....	200	Dixon v. Clow (24 Wend. 188).....	18
Borough of Pottsville, Crosland v. (126 Pa. St. 511, 18 Atl. Rep. 15).....	190	Dole, Van Rensselaer v. (1 Johns. Cas. 279).....	115
Boulware v. Craddock (30 Cal. 190).....	214	Donahue, Commonwealth v. (148 Mass. 529, 20 N. E. Rep. 171).....	77
Bowen v. Hall (6 Q. B. Div. 333).....	46	Donnell, Hatch v. (74 Me. 163).....	150
Bradley v. Fisher (13 Wall. 335).....	206	Dowdney, Fowler v. (2 Moody & R. 119).....	114
Bradstreet, Sunderlin v. (46 N. Y. 188).....	142	Eckert v. Long Island R. Co. (43 N. Y. 502).....	236
Brame, Mobile Life Ins. Co. v. (95 U. S. 754).....	247	Elliott, Rogers v. (146 Mass. 349, 15 N. E. Rep. 768).....	176
Brantley, White v. (37 Ala. 430).....	194	Engelhardt v. State (88 Ala. 100, 7 South. Rep. 154).....	73
Brettun v. Anthony (103 Mass. 37).....	147	Engelhardt, Homer v. (117 Mass. 539).....	128
Bromage v. Prosser (4 Barn. & C. 247).....	128	Esmay v. Fanning (9 Barb. 176).....	203
Brown v. Kendall (6 Cush. 292).....	51	Fanning, Esmay v. (9 Barb. 176).....	203
Brown, Lunt v. (13 Me. 236).....	196	Ferguson, Foshay v. (2 Denio, 617).....	100
Bump v. Betts (19 Wend. 421).....	107	Fischer v. Langbein (103 N. Y. 84, 8 N. E. Rep. 251).....	90
Byam v. Collins (111 N. Y. 143, 19 N. E. Rep. 75).....	139	Fisher, Bradley v. (13 Wall. 335).....	206
Campbell v. Race (7 Cush. 408).....	160	Forward v. Adams (7 Wend. 204).....	116
Campbell v. Seaman (63 N. Y. 568).....	164	Foshay v. Ferguson (2 Denio, 617).....	100
Cardinal v. Smith (109 Mass. 158).....	102	Fow v. Roberts (108 Pa. St. 489).....	181
Carl v. Ayers (53 N. Y. 14).....	94	Fowler v. Dowdney (2 Moody & R. 119).....	114
Castle v. Houston (19 Kan. 417).....	132	Francis, Moore v. (121 N. Y. 199, 23 N. E. Rep. 1127).....	126
Chambers, Clark v. (3 Q. B. Div. 327).....	32	Freeman v. Boland (14 R. I. 39).....	200
Chapman v. State (78 Ala. 463).....	70	Fresh v. Cutter (73 Md. 87, 20 Atl. Rep. 774).....	136
Chase v. Whitlock (3 Hill, 139).....	113	Frome v. Dennis (45 N. J. Law, 515).....	199
Chicago & R. I. R. Co., Halligan v. (15 Ill. 558).....	154	Gelzenleuchter v. Niemeyer (64 Wis. 316, 25 N. W. Rep. 442).....	88
City of Syracuse, McCarthy v. (46 N. Y. 194).....	212	Giles v. Simonds (15 Gray, 441).....	157
Clarion County, Armstrong County v. (66 Pa. St. 218).....	68	Gilman, McDonough v. (3 Allen, 264).....	182
Clark v. Chambers (3 Q. B. Div. 327).....	32	Glidden, Pullen v. (66 Me. 202).....	99
Clinton v. Myers (46 N. Y. 511).....	172	Golderman v. Stearns (7 Gray, 181).....	116
Clow, Dixon v. (24 Wend. 188).....	18	Gordon v. Harper (7 Term R. 9).....	201
Cole v. Turner (6 Mod. 149).....	72	Gorham v. Ives (2 Wend. 534).....	114
Cole, Dester v. (6 Wis. 320).....	195		
Collins, Byam v. (111 N. Y. 143, 19 N. E. Rep. 75).....	129		
Columbia Steam Nav. Co., Leonard v. (84 N. Y. 48).....	265		
Combs, Lawrence v. (37 N. H. 331).....	163		

	Page		Page
Grainger v. Hill (4 Bing. N. C. 212).....	107	McGarvish, Ireland v. (1 Sandf. 155).....	114
Gramlich v. Wurst (86 Pa. St. 74).....	5	McKesson, Muller v. (73 N. Y. 195).....	191
Grigsby v. Stapleton (94 Mo. 423, 7 S. W. Rep. 421).....	258	Manhattan Ry. Co., Lowery v. (99 N. Y. 158, 1 N. E. Rep. 608).....	38
Guest v. Reynolds (68 Ill. 478).....	1	Mann, Davies v. (10 Mees. & W. 545).....	225
Guille v. Swan (19 Johns. 381).....	49	Manufacturers' Nat. Bank, Moore v. (123 N. Y. 420, 25 N. E. Rep. 1048).....	145
Hager v. Danforth (20 Barb. 16).....	81	Marshall v. Welwood (38 N. J. Law, 339).....	221
Hagget, Hobart v. (12 Me. 67).....	195	Merrifield v. Lombard (13 Allen, 16).....	175
Hall, Bowen v. (6 Q. B. Div. 333).....	46	Metropolitan El. Ry. Co., Lynch v. (90 N. Y. 77).....	86
Hall, Murray v. (7 Man. G. & S. 441).....	157	Miller v. Milligan (48 Barb. 30).....	98
Halligan v. Chicago & R. I. R. Co. (15 Ill. 558).....	154	Miller v. Woodhead (104 N. Y. 471, 11 N. E. Rep. 57).....	4
Hancock, Thurston v. (12 Mass. 220).....	23	Miller, Young v. (3 Hill. 21).....	111
Harper, Gordon v. (7 Term R. 9).....	201	Milligan, Miller v. (48 Barb. 30).....	98
Harris, Secor v. (18 Barb. 425).....	119	Mills v. Armstrong (L. R. 13 App. Cas. 1).....	233
Hartfield v. Roper (21 Wend. 615).....	238	Millward, Mulvehall v. (11 N. Y. 343).....	218
Hatch v. Donnell (74 Me. 163).....	150	Milwaukee & St. P. Ry. Co. v. Kellogg (94 U. S. 469).....	41
Hayden, Keegan v. (14 R. I. 175).....	68	Mix, Holley v. (3 Wend. 350).....	93
Heeg v. Licht (80 N. Y. 579).....	178	Mobile Life Ins. Co. v. Brame (95 U. S. 754).....	247
Heisel, Quinn v. (40 Mich. 576).....	96	Moody v. Baker (5 Cow. 351).....	44
Hexamer v. Webb (101 N. Y. 377, 4 N. E. Rep. 755).....	240	Moore v. Francis (121 N. Y. 199, 23 N. E. Rep. 1127).....	126
Hickey v. Morrell (103 N. Y. 454, 7 N. E. Rep. 321).....	260	Moore v. Manufacturers' Nat. Bank (123 N. Y. 420, 25 N. E. Rep. 1048).....	145
Hill, Grainger v. (4 Bing. N. C. 212).....	107	Morain v. Devlin (132 Mass. 87).....	50
Hobart v. Hagget (12 Me. 67).....	195	Morgan v. Vale of Neath Ry. Co. (5 Best & S. 570, L. R. 1 Q. B. 149).....	244
Holley v. Mix, (3 Wend. 350).....	93	Morrell, Hickey v. (102 N. Y. 454, 7 N. E. Rep. 321).....	260
Homer v. Engelhardt (117 Mass. 539).....	128	Martin v. Shoppee (3 Carr. & P. 373).....	71
Houston, Castle v. (19 Kan. 417).....	132	Moulton v. Beecher (1 Abb. N. C. 193).....	103
Hutchinson, Litchfield v. (117 Mass. 195).....	257	Mulledy, Willy v. (78 N. Y. 310).....	16
Illinois Cent. R. Co. v. Whittemore (43 Ill. 420).....	79	Muller v. McKesson (73 N. Y. 195).....	191
Ireland v. McGarvish (1 Sandf. 155).....	118	Mulvehall v. Millward (11 N. Y. 343).....	218
Ives, Gorham v. (2 Wend. 534).....	114	Murray v. Hall (7 Man. G. & S. 441).....	157
Jones v. Williams (11 Mees. & W. 176).....	189	Myers, Clinton v. (46 N. Y. 511).....	172
Jones, Baltimore & P. R. Co. v. (95 U. S. 439).....	238	Myers, Stephens v. (4 Carr. & P. 349).....	71
Jones, Bird v. (7 Adol. & E. [N. S.] *742).....	82	Newkirk v. Sabler (9 Barb. 652).....	151
Keegan v. Hayden (14 R. I. 175).....	68	Newman v. Phillipsburg Horse-Car R. Co. (52 N. J. Law, 446, 19 Atl. Rep. 1102).....	231
Keenan v. Southworth (110 Mass. 474).....	214	New York Cent. & H. R. R. Co., Rich v. (87 N. Y. 382).....	56
Kemp, Baltimore City Pass. Ry. Co. v. (61 Md. 619).....	54	Niemeyer, Gelzenleuchter v. (64 Wis. 316, 25 N. W. Rep. 442).....	88
Kellogg, Milwaukee & St. P. Ry. Co. v. (94 U. S. 469).....	41	Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park (40 N. J. Eq. 447, 3 Atl. Rep. 168).....	26
Kendall v. Stone (5 N. Y. 14).....	149	Oliver, Weld v. (21 Pick. 559).....	202
Kendall, Brown v. (6 Cush. 292).....	51	Olliot, Bessey v. (T. Raym. 467).....	49
King, Singer Manuf'g Co. v. (14 R. I. 511).....	205	O'Malley, Commonwealth v. (131 Mass. 423).....	77
Lamb v. Stone (11 Pick. 526).....	8	Pantzar v. Tilly Foster Min. Co. (99 N. Y. 368, 2 N. E. Rep. 24).....	242
Langbein, Fischer v. (103 N. Y. 84, 8 N. E. Rep. 251).....	90	Paulet, Bigaquette v. (134 Mass. 123).....	216
Larmore v. Crown Point Iron Co. (101 N. Y. 391, 4 N. E. Rep. 752).....	219	Peck, Derry v. (L. R. 14 App. Cas. 337).....	249
Laverty v. Snethen (68 N. Y. 522).....	197	People v. Warren (5 Hill. 440).....	216
Lawes Chemical Manure Co., Western Counties Manure Co. v. (L. R. 9 Exch. 218).....	11	Phillips v. Trull (11 Johns. 486).....	97
Lawrence v. Combs (37 N. H. 331).....	163	Phillipsburg Horse-Car R. Co. Newman v. (52 N. J. Law, 446, 19 Atl. Rep. 1102).....	231
Leonard v. Columbia Steam Nav. Co. (84 N. Y. 48).....	265	Pollock, Pope v. (46 Ohio St. 367, 21 N. E. Rep. 356).....	104
Licht, Heeg v. (80 N. Y. 579).....	178	Pope v. Pollock (46 Ohio St. 367, 21 N. E. Rep. 356).....	104
Litchfield v. Hutchinson (117 Mass. 195).....	257	Portland Manuf'g Co., Webb v. (3 Sunn. 189).....	19
Lombard, Merrifield v. (13 Allen, 16).....	175	Proctor v. Adams (113 Mass. 376).....	159
Long v. Warren (68 N. Y. 426).....	263	Prosser, Brounage v. (4 Barn. & C. 247).....	128
Long Island R. Co., Eckert v. (43 N. Y. 502).....	236	Pullen v. Glidden (66 Me. 202).....	99
Lowery v. Manhattan Ry. Co. (99 N. Y. 158, 1 N. E. Rep. 608).....	38	Pullman v. Walter Hill & Co. ([1891] 1 Q. B. 524).....	131
Lunt v. Brown (13 Me. 236).....	196	Quinn v. Heisel (40 Mich. 576).....	96
Lyke, Van Leuven v. (1 N. Y. 515).....	152	Race, Campbell v. (7 Cush. 408).....	160
Lynch v. Metropolitan El. Ry. Co. (90 N. Y. 77).....	86		
McCarthy v. City of Syracuse (46 N. Y. 194).....	212		
McDonough v. Gilman (3 Allen, 264).....	182		

	Page		Page
Reynolds, Guest v. (68 Ill. 478).....	1	Upton v. Vail (6 Johns. 181).....	31
Rice v. Coolidge (121 Mass. 393).....	13	Vail, Upton v. (6 Johns. 181).....	31
Rich v. New York Cent. & H. R. R. Co. (87 N. Y. 382).....	56	Vale of Neath Ry. Co., Morgan v. (5 Best & S. 570, L. R. 1 Q. B. 149).....	244
Roberts v. Roberts (5 Best & S. 384).....	28	Van Ankin v. Westfall (14 Johns. 233).....	113
Roberts, Fow v. (108 Pa. St. 489).....	181	Vandenburgh v. Truax (4 Denio, 464).....	37
Robbins, Tillson v. (68 Me. 295).....	124	Van Deusen, Sheffill v. (13 Gray, 304).....	130
Rogers v. Elliott (146 Mass. 349, 15 N. E. Rep. 763).....	176	Van Horn v. Van Horn (52 N. J. Law, 284, 20 Atl. Rep. 485).....	109
Roper, Hartfield v. (21 Wend. 615).....	228	Van Leuven v. Lyke (1 N. Y. 515).....	152
Rounds v. Delaware, L. & W. R. Co. (64 N. Y. 129).....	237	Van Rensselaer v. Dole (1 Johns. Cas. 279).....	115
Sabler, Newkirk v. (9 Barb. 652).....	151	Walter v. Sample (25 Pa. St. 275).....	101
St. Helen's Smelting Co. v. Tipping (11 H. L. Cas. *642).....	168	Walter Hill & Co., Pullman v. ([1891] 1 Q. B. 524).....	131
Sample, Walter v. (25 Pa. St. 275).....	101	Wands, Terwilliger v. (17 N. Y. 54).....	121
Sawyer v. Davis (136 Mass. 239).....	186	Ward, Tillett v. (10 Q. B. Div. 17).....	162
Scribner v. Beach (4 Denio, 448).....	75	Ward, Weaver v. (Hobart, 134).....	49
Seaman, Campbell v. (63 N. Y. 568).....	164	Warren, Long v. (68 N. Y. 426).....	263
Secor v. Harris (18 Barb. 425).....	119	Warren, People v. (5 Hill, 440).....	216
Sheehan v. Sturges (53 Conn. 481, 2 Atl. Rep. 841).....	80	Washburn Iron Co., Wesson v. (13 Allen, 95).....	184
Sheffill v. Van Deusen (13 Gray, 304).....	130	Weaver v. Devendorf (3 Denio, 117).....	211
Shoppes, Mortin v. (3 Carr. & P. 373).....	71	Weaver v. Ward (Hobart, 134).....	49
Simonds, Giles v. (15 Gray, 441).....	157	Webb v. Beavan (11 Q. B. Div. 609).....	112
Singer Manuf'g Co. v. King (14 R. I. 511).....	205	Webb v. Portland Manuf'g Co. (3 Sumn. 189).....	19
Six Carpenters' Case (8 Coke, 146a, 1 Smith, Lead. Cas. 62).....	155	Webb, Hexamer v. (101 N. Y. 377, 4 N. E. Rep. 755).....	240
Smith v. Thackerah (L. R. 1 C. P. 564).....	30	Weld v. Oliver (21 Pick. 559).....	202
Smith, Cardival v. (109 Mass. 158).....	102	Welsh v. Wilson (34 Minn. 92, 24 N. W. Rep. 327).....	215
Smith, Congreve v. (18 N. Y. 79).....	180	Welwood, Marshall v. (38 N. J. Law, 339).....	221
Snethen, Laverty v. (68 N. Y. 522).....	197	Wesson v. Washburn Iron Co. (13 Allen, 95).....	184
Southworth, Keenan v. (110 Mass. 474).....	214	Western Counties Manure Co. v. Lawes Chemical Manure Co. (L. R. 9 Exch. 218).....	11
Spencer, Williams v. (5 Johns. 352).....	161	Westfall, Van Ankin v. (14 Johns. 233).....	113
Stapleton, Grigsby v. (94 Mo. 423, 7 S. W. Rep. 421).....	258	White v. Brantley (37 Ala. 430).....	194
State v. Crow (1 Ired. Law, 375).....	72	Whitlock, Chase v. (3 Hill, 139).....	113
State, Chapman v. (78 Ala. 463).....	70	Whittemore, Illinois Cent. R. Co. v. (43 Ill. 420).....	79
State, Engelhardt v. (88 Ala. 100, 7 South. Rep. 154).....	73	Wilcox, Barkley v. (86 N. Y. 140).....	170
Stearns, Golderman v. (7 Gray, 181).....	116	Williams v. Spencer (5 Johns. 352).....	161
Stephens v. Myers (4 Carr. & P. 349).....	71	Williams, Jones v. (11 Mees. & W. 176).....	189
Stone, Kendall v. (5 N. Y. 14).....	149	Willy v. Mulledy (78 N. Y. 310).....	16
Stone, Lamb v. (11 Pick. 526).....	8	Wilson, Welsh v. (34 Minn. 92, 24 N. W. Rep. 327).....	215
Sturges, Sheehan v. (53 Conn. 481, 2 Atl. Rep. 841).....	80	Wiman, Woods v. (122 N. Y. 445, 25 N. E. Rep. 919).....	144
Sunderlin v. Bradstreet (46 N. Y. 188).....	142	Winchester, Thomas v. (6 N. Y. 397).....	65
Swan, Guille v. (19 Johns. 381).....	49	Winona & St. P. R. Co., Twist v. (39 Minn. 164, 39 N. W. Rep. 402).....	226
Terwilliger v. Wands (17 N. Y. 54).....	121	Winterbottom v. Wright (10 Mees. & W. 109).....	62
Thackerah, Smith v. (L. R. 1 C. P. 564).....	30	Woodhead, Miller v. (104 N. Y. 471, 11 N. E. Rep. 57).....	4
Thomas v. Winchester (6 N. Y. 397).....	65	Woods v. Wiman (122 N. Y. 445, 25 N. E. Rep. 919).....	144
Thurston v. Hancock (12 Mass. 220).....	23	Wright, Barholt v. (45 Ohio St. 177, 12 N. E. Rep. 185).....	74
Tillett v. Ward (10 Q. B. Div. 17).....	162	Wright, Winterbottom v. (10 Mees. & W. 109).....	62
Tillson v. Robbins (68 Me. 295).....	124	Wurst, Gramlich v. (86 Pa. St. 74).....	5
Tilly Foster Min. Co., Pantzar v. (99 N. Y. 368, 2 N. E. Rep. 24).....	242	Young v. Miller (3 Hill, 21).....	111
Tipping, St. Helen's Smelting Co. v. (11 H. L. Cas. *642).....	168		
Truax, Vandenburgh v. (4 Denio, 464).....	37		
Trull, Phillips v. (11 Johns. 486).....	97		
Turner, Cole v. (6 Mod. 149).....	92		
Twist v. Winona & St. P. R. Co. (39 Minn. 164, 39 N. W. Rep. 402).....	226		

CASES CITED.

[Titles marked by a dagger (thus, †) refer to cases cited by the editor and authorities cited by counsel.]

	Page		Page
Abbott v. Booth, 51 Barb. 546.....	90	Asser v. Finch, 2 Lev. 234.....	151
Abbott v. Macfie, 2 Hurl. & C. 744, 33 Law J. Exch. 177.....	34	†Atkinson v. Water-Works Co., 2 Exch. Div. 441.....	18
†Abrath v. Railroad Co., 11 Q. B. Div. 440, L. R. 11 App. Cas. 247.....	101	Attorney General v. Cleaver, 18 Ves. 211, 219	165, 166
Absor v. French, 2 Show. 28.....	151	Attorney General v. Telegraph Co., 30 Beav. 287.....	166
†Achorn v. Piper, 66 Iowa, 694, 24 N. W. Rep. 513.....	128	Attorney General v. Wilson, 4 Jur. 1174, 1 Craig & P. 1.....	69
Achtenhagen v. City of Watertown, 13 Wis. 331.....	227	Atwood v. Monger, Style, 378.....	105
Acker v. Campbell, 23 Wend. 372.....	215	Austin, Case of, 5 Rawle, 204.....	210
Ackerley v. Parkinson, 3 Maule & S. 411.....	209	Austin v. Culpeper, Skin. 124.....	125
Acton v. Blundell, 12 Mees. & W. 324.....	27, 172	Austin v. Railway Co., L. R. 2 Q. B. 442.....	56
†Adams v. Marshall, 138 Mass. 228, 238.....	15	†Austin v. Steam-Boat Co., 43 N. Y. 75.....	226
Adams v. Paige, 7 Pick. 542.....	8, 10, 11	Avery v. Maxwell, 4 N. H. 36, 37.....	163
Adams v. Railway Co., 3 Ct. Sess. Cas. (4th Ser.) 215.....	235	†Babcock v. Utter, 1 Abb. Dec. 27.....	159
Adams v. Waggoner, 33 Ind. 531.....	73, 74	Backhouse v. Bonomi, 9 H. L. Cas. 503, 34 Law J. Q. B. 181.....	15, 30, 32
†Adams v. Young, 44 Ohio St. 80, 4 N. E. Rep. 599.....	48	†Bacon v. Railroad Co., 55 Mich. 224, 21 N. W. Rep. 324.....	132
Adamson v. Jarvis, 4 Bing. 66.....	69	Bacon v. Towne, 4 Cush. 217, 218.....	95, 102
Adsit v. Brady, 4 Hill, 630.....	213	Bacon v. Waters, 2 Allen, 400.....	102, 103
†Abern v. Steele, 115 N. Y. 203, 22 N. E. Rep. 193.....	183	†Bagshaw v. Gaward, Yelv. 96, 97, Cro. Jac. 148	155, 156
†Alderson v. Maddison, 5 Exch. Div. 296.....	11	†Bailey v. Bussing, 28 Conn. 455.....	69
Aldred's Case, 9 Coke, 58, 59.....	3, 25, 179	Baily v. Merrell, 3 Bulst. 95.....	251
Alexander v. Alexander, 9 Wend. 141.....	111	Baker v. Bolton, 1 Camp. 493.....	247
†Alexander v. Church, 53 Conn. 561, 4 Atl. Rep. 103.....	257	Baldwin v. Hayden, 6 Conn. 453.....	76, 78
†Alexander v. Hard, 64 N. Y. 228.....	155	Baldwin v. Weed, 17 Wend. 224.....	95
Alexander v. Southey, 5 Barn. & Ald. 247.....	205	Balkum v. State, 40 Ala. 671.....	70
†Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. Rep. 433; 5 N. E. Rep. 908.....	201	Ball v. Ray, L. R. 8 Ch. App. 467.....	167
†Allen v. Crofoot, 5 Wend. 506.....	157	Ballard v. Tomlinson, 26 Ch. Div. 194.....	27
†Allen v. Willard, 57 Pa. St. 374.....	6	Baltimore & O. R. Co. v. Blocher, 27 Md. 277, 287.....	56
†Allison v. Jack, 76 Iowa, 205, 40 N. W. Rep. 811.....	257	†Baltimore & O. R. Co. v. Mulligan, 45 Md. 456	226
†Allsop v. Allsop, 5 Hurl. & N. 534.....	28, 29	†Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390	56
†American Print-Works v. Lawrence, 23 N. J. Law, 9, 590.....	159	†Baltimore & O. R. Co. v. Schwindling, 101 Pa. St. 258.....	S
†American Union Tel. Co. v. Middleton, 80 N. Y. 408.....	153	Baltimore & P. R. Co. v. Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719.....	187, 189
†Amy v. Supervisors, 11 Wall. 136.....	214	Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344.....	56
†Anderson v. Arnold's Ex'r, 79 Ky. 370.....	50	Bamford v. Turnley, 31 Law J. Q. B. 286, 3 Best & S. 66.....	165, 185
Anderson v. State, 6 Baxt. 608.....	78	Bancroft v. Cambridge, 126 Mass. 438-441.....	186, 187
Andre v. Johnson, 6 Blackf. 375.....	78	Bankart v. Houghton, 27 Beav. 425.....	167
†Andrew v. Deshler, 45 N. J. Law. 167.....	150	Barber v. Rollinson, 1 Crompt. & M. 330.....	89
Andrews v. Ludlow, 5 Pick. 32.....	10	Barclay v. Commonwealth, 25 Pa. St. 503.....	190
†Angus v. Clifford, [1891.] 2 Ch. Div. 449.....	257	Bareham v. Hall, 22 Law T. (N. S.) 116.....	165
Angus v. Radin, 5 N. J. Law. 815.....	153	Barker v. Bates, 13 Pick. 255.....	159
†Anon., 60 N. Y. 262.....	115	†Barkley v. Wilcox, 19 Hun. 320.....	170
†Anthony v. Haneys, 8 Bing. 186.....	153	Barns v. Graham, 4 Cow. 452.....	204
Anthony v. Slaid, 11 Metc. (Mass.) 290.....	248	Barnardiston v. Soame, 6 State Tr. 1063, 1 East, 56s, note.....	212
Arkwright v. Newbold, 17 Ch. Div. 301.....	250, 254	Barnes v. McCrate, 32 Me. 442.....	14, 147
Armstrong v. Railway Co., L. R. 10 Exch. 47	233, 235	Barnes v. Martin, 15 Wis. 240.....	78
Arnold v. Clifford, 2 Sum. 238.....	69	Barnes v. Ward, 9 C. B. 392, 420.....	8
Arundell v. White, 14 East. 216.....	103	†Barr v. Boyles, 96 Pa. St. 31.....	216
Ashby v. White, 1 Salk. 21, 2 Ld. Raym. 938, 953, 955; 6 Mod. 45, 53; Holt, 524; 1 Smith, Lead. Cas. 472; 1 Smith, Lead. Cas. (5th Ed.) 216; 1 Smith, Lead. Cas. (8th Ed.) 264.....	9, 20, 30, 47, 48, 235	†Barr v. Moore, 87 Pa. St. 385.....	128
Ashley v. Dixon, 48 N. Y. 430.....	248	Barron v. Alexander, 27 Mo. 530.....	259
		Barry v. Railway Co., 92 N. Y. 289.....	220
		Bartholomew v. Harwinton, 33 Conn. 408.....	189
		Bartlett v. Gas-Light Co., 117 Mass. 533.....	51
		†Bartlett v. Hoyt, 29 N. H. 317.....	202

	Page		Page
Bartlett v. Perkins, 13 Me. 87.....	154	†Bohan v. Gas-Light Co., 122 N. Y. 18, 25 N. E. Rep. 246.....	170
Bartley v. Richtmyer, 4 N. Y. 38.....	218	Bolingbroke v. Board, L. R. 9 C. P. 575.....	238
Barton v. City of Syracuse, 37 Barb. 292, 36 N. Y. 54.....	213	Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241.....	21
Barton v. Williams, 5 Barn. & Ald. 395.....	203	†Bonomi v. Backhouse, El. Bl. & El. 622, 646; 27 Law J. Q. B. 378; 23 Law J. Q. B. 378.....	15, 30
Bartonshill Coal Co. v. Reid, 3 Macq. 266, 275.....	242, 246	†Boorman v. Brown, 3 Q. B. 511, 11 Clark & F. 1.....	56
Barwell v. Brooks, 1 Law T. 454.....	167	Booth v. Railroad Co., 73 N. Y. 40.....	242-244
†Bassom v. Dempsey, 143 Mass. 409, 9 N. E. Rep. 744.....	155	Bostwick v. Lewis, 2 Day, 447.....	13, 14
†Basébé v. Matthews, L. R. 2 C. P. 684.....	103	Boulter v. Clark, Bull. N. P. 16.....	74
Basely v. Clarkson, 3 Lev. 37.....	195	Bourden v. Alloway, 11 Mod. 180.....	90
†Bassell v. Elmore, 48 N. Y. 561.....	124	†Bowden v. Lewis, 13 R. L. 189.....	191
†Batchelor v. Fortescue, 11 Q. B. Div. 474.....	230	†Bowen v. Fenner, 40 Barb. 339.....	202
†Bateman v. Lyall, 7 C. B. (N. S.) 638.....	29	Bowen v. Hall, 6 Q. B. Div. 533.....	110
Bates v. Conkling, 10 Wend. 339.....	204	Bowen v. Matheson, 14 Allen, 499.....	14
Battisill v. Reed, 18 C. B. (N. S.) 696.....	167	†Bowen v. Railroad Co., 59 Conn. 364, 21 Atl. Rep. 1073.....	225
Baum v. Clause, 5 Hill, 196.....	136	Bower v. Hill, 1 Bing. N. C. 549.....	21
†Baxter v. Doe, 142 Mass. 558, 8 N. E. Rep. 415.....	18	Bowlsby v. Speer, 31 N. J. Law, 351.....	171, 172
Bayly v. Merrel, Cro. Jac. 386.....	264	Bowring v. Stevens, 2 Car. & P. 337.....	264
Baynes v. Brewster, 2 Q. B. 384.....	97	Boyce v. Brockway, 31 N. Y. 490.....	50, 198
†Beach v. Hancock, 27 N. H. 223.....	71	†Boyce v. Railroad Co., 63 Iowa, 70, 18 N. W. Rep. 673.....	267
Beach v. Ranney, 2 Hill, 309, 314.....	123, 123, 149, 150	†Boyd v. Conklin, 54 Mich. 583, 20 N. W. Rep. 595.....	172
Beach v. Steam-Boat Co., 30 Barb. 433.....	266	Brace v. Yale, 10 Allen, 441.....	174
Beal v. Finch, 11 N. Y. 128.....	68	Bradley, Ex parte, 7 Wall. 364.....	207
Bealey v. Shaw, 6 East, 208.....	21, 22	†Bradley v. Cramer, 59 Wis. 309, 18 N. W. Rep. 268.....	128
Beard v. Murphy, 37 Vt. 99.....	190	†Bradley v. Fuller, 118 Mass. 239.....	11
Beardmore v. Tredwell, 31 Law J. Ch. 892.....	165	Bradley's Fish Co. v. Dudley, 37 Conn. 136.....	167
Beardsley v. Beardsley, 5 Blatchf. 498.....	144	Bradt v. Towsley, 13 Wend. 253.....	124
†Beare & Hodge's Case, Litt. R. 34; Hct. 16.....	156	Brady v. Weeks, 3 Barb. 157, 159.....	167, 179
Beaty v. Perkins, 6 Wend. 382.....	89	Bralley v. Southborough, 6 Cush. 141.....	161
Beauchamp v. Mining Co., 50 Mich. 163.....	55	Brainard v. Railroad Co., 7 Cush. 506, 511.....	184
Beauchampe v. Croft, Keilw. 26.....	105	†Brand v. Hinchman, 65 Mich. 590, 36 N. W. Rep. 664.....	106
Bebinger v. Sweet, 1 Abb. N. C. 263.....	61, 108	Brand v. Railway, L. R. 1 Q. B. 130, L. R. 2 Q. B. 223, L. R. 4 H. L. 171.....	187
Beck v. Carter, 68 N. Y. 283.....	220	†Brayton v. Fall River, 113 Mass. 218.....	185
†Beckham v. Hillier, 47 N. J. Law, 12.....	228	Bretherton v. Wood, 3 Brod. & B. 54.....	55, 56
Beckwith v. Shordike, 4 Burrows, 2092.....	153	Brian v. Cockman, Cro. Car. 322.....	45
Bedingfield v. Onslow, 3 Lev. 200.....	154	†Brick v. Railroad Co., 98 N. Y. 211.....	247
Beeler v. Jackson, 64 Md. 593, 2 Atl. Rep. 916.....	137	Brickell v. Railroad Co. 120 N. Y. 290, 24 N. E. Rep. 449.....	236
Behrens v. McKenzie, 23 Iowa, 333, 343.....	51	†Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. Rep. 449.....	236
Bell v. Hansley, 3 Jones, (N. C.) 131.....	74	Bridge v. Railway Co., 3 Mees. & W. 244, 246.....	224, 225, 235
Bell v. Morrison, 27 Miss. 68.....	68	Bridge Co. v. United States, 105 U. S. 470, 480.....	189
Bell v. Stone, 1 Bos. & P. 331.....	125	†Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. Rep. 513.....	145
†Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 408.....	233	Brightman v. Fairhaven, 7 Gray, 271.....	184
Bemis v. Upham, 13 Pick. 169.....	176	Brill v. Flagler, 23 Wend. 354.....	179
†Beninger v. Corwin, 24 L. J. Law, 257.....	260	Brittain v. Kinnaird, 1 Brod. & B. 432.....	212
Benton v. Pratt, 2 Wend. 385.....	32, 61	Broadbent v. Gas Co., 7 De Gex, M. & G. 436.....	167
Bentz v. Armstrong, 8 Watts & S. 40.....	171	Brock v. Copeland, 1 Esp. 203.....	193
†Benzing v. Steinway, 101 N. Y. 547, 5 N. E. Rep. 449.....	244	†Brock v. Stimson, 108 Mass. 520.....	157
Berry v. Fletcher, 1 Dill. 67, 71.....	68	Brooker v. Coffin, 5 Johns. 188.....	111
Berry v. Vantries, 12 Serg. & R. 89.....	205	Brow v. Hathaway, 13 Allen, 239.....	138
Besson v. Southard, 10 N. Y. 236.....	98, 99	†Brown v. Boom Co., 109 Pa. St. 57, 1 Atl. Rep. 156.....	53
Beswick v. Cunden, Cro. Eliz. 520.....	182	Brown v. Carpenter, 26 Vt. 638.....	192
Betts v. Gibbins, 2 Adol. & E. 57.....	69	Brown v. Chadsey, 39 Barb. 260-263.....	90
Bicknell v. Dorion, 16 Pick. 478, 487.....	103	†Brown v. Collins, 53 N. H. 442.....	53, 223
Bigelow v. Stearns, 19 Johns. 39.....	212	†Brown v. De Groff, 50 N. J. Law, 409, 14 Atl. Rep. 219.....	191
†Billingsley v. White, 59 Pa. St. 469.....	197	Brown v. Dinsmoor, 3 N. H. 103.....	154
Bird v. Holbrook, 4 Bing. 628.....	34, 193, 220	†Brown v. Howard, 14 Johns. 119.....	81
Bird v. Randall, 3 Burrows, 1345, 1354.....	45, 150	Brown v. Howe, 9 Gray, 84, 85.....	51
†Bishop v. Ely, 9 Johns. 294.....	37	†Brown v. Leach, 107 Mass. 364.....	265
†Bishop v. Ranney, 59 Vt. 316, 7 Atl. Rep. 820.....	71	†Brown v. Perkins, 1 Allen, 89, 12 Gray, 89.....	153, 191
Bishop v. Williamson, 11 Me. 495.....	214	Brown v. Railroad Co., 58 Me. 384.....	227
Bitz v. Meyer, 40 N. J. Law, 252.....	105	†Brown v. Randall, 36 Conn. 56.....	103
†Bixby v. Dunlap, 22 Amer. Rep. 475.....	47	†Brown v. Robins, 4 Hurl. & N. 186, 28 Law J. Exch. 250.....	30
Blackman v. Simmons, 3 Car. & P. 138.....	192, 193	†Brown v. Watson, 47 Me. 161.....	185
Blades v. Higgs, 10 C. B. (N. S.) 713; 12 C. B. (N. S.) 501; 13 C. B. (N. S.) 844; 11 H. L. Cas. 621.....	78	†Browning v. Cover, 108 Pa. St. 595.....	203
†Blagge v. Ilsley, 127 Mass. 191.....	219	Brownlie v. Campbell, L. R. 5 App. Cas. 925, 935.....	250, 255
†Blaisdell v. Railroad Co., 51 N. H. 485.....	159	†Bruch v. Carter, 32 N. J. Law, 554.....	196
Blake v. Barnard, 9 Car. & P. 626.....	71	†Bryan v. State, 44 Ga. 328.....	47
Blake v. Ferris, 5 N. Y. 58.....	241	Brydon v. Stewart, 2 Macq. 34.....	242
Blake v. Jerome, 14 Johns. 406.....	152	†Buck v. Colbath, 3 Wall. 334.....	215
Blanchard v. Baker, 8 Greenl. 253, 266, 268, 270.....	21-23	Bulkeley v. Smith, 2 Duer, 261.....	98, 99
Blaymire v. Haley, 6 Mees. & W. 55.....	218		
†Blodgett v. Stone, 60 N. H. 167.....	23		
Blood v. Railroad Corp., 2 Gray, 140.....	184		
Bloodworth v. Gray, 5 Scott, N. R. 11.....	116		
Bloss v. Tobey, 2 Pick. 320.....	149		
Blyth v. Topham, Cro. Jac. 158.....	7		
Blythe v. Tompkins, 2 Abb. Fr. 468.....	90		
†Board of Trade Tel. Co. v. Barnett, 107 Ill. 307.....	153		
Bobb v. Bosworth, Litt. Sel. Cas. 81.....	78		

	Page
Bullard v. Harrison, 4 Maule & S. 387, 393.	160
†Bullitt v. Farrar, 42 Minn. 8, 43 N. W. Rep. 556.	258
Bullock v. Babcock, 3 Wend. 391, 393, 394.	51, 230
Bump v. Betts, 19 Wend. 421.	105
†Bunting v. Hogsett, 139 Pa. St. 363, 21 Atl. Rep. 31, 33, 34.	48, 236
Burckle v. Dock Co., 2 Hall, 151.	229
†Burgess v. Carpenter, 16 Amer. Rep. 643.	47
†Burgess v. Graffam, 18 Fed. Rep. 251.	196
Burland v. Board, 3 Best & S. 271.	13
Burlingame v. Bell, 16 Mass. 320.	10
†Burnet v. Wells, 12 Mod. 420.	12
Burns v. Erben, 40 N. Y. 463.	90, 95
Burrowes v. Lock, 10 Ves. 470.	250
Burrows v. Coke Co., L. R. 7 Exch. 96.	35
Bury v. Pope, Cro. Eliz. 118.	3
†Bush v. Brainerd, 1 Cow. 78, and note.	162
†Bush v. Steinman, 1 Bos. & P. 405.	25
Butler v. Kent, 19 Johns. 228.	150
Butler v. Peck, 16 Ohio St. 334.	171
Butterfield v. Forrester, 11 East, 60.	224, 225
†Buzzell v. Manufacturing Co., 48 Me. 113.	244
†Byam v. Bickford, 140 Mass. 31, 2 N. E. Rep. 687.	157
†Cahill v. People, 106 Ill. 621.	95
Cairnes v. Bleecker, 12 Johns. 300.	198
†Calder v. Smalley, 66 Iowa, 219, 23 N. W. Rep. 638.	181
†Caldwell v. Henry, 76 Mo. 254.	257
Call v. Allen, 1 Allen, 137.	187
†Callanan v. Gilman, 107 N. Y. 360, 14 N. E. Rep. 264.	181
Campbell v. Arnold, 1 Johns. 511.	154
Campbell v. Rickards, 5 Barn. & Adol. 846.	43
Campbell v. Seaman, 63 N. Y. 568.	179
Campbell v. Stakes, 2 Wend. 137, 143.	201, 230
Canning v. Williamstown, 1 Cush. 451.	161
†Capital and Counties Bank v. Henty, L. R. 7 App. Cas. 741.	149
Card v. Case, 57 E. C. L. 622, 623, note b.	192, 193
Cardwell v. McClelland, 3 Sneed, 150.	259
†Carey v. Rae, 58 Cal. 159.	161
†Carey v. Railroad Co., 1 Cush. 475.	248
†Carhart v. Gas-Light Co., 22 Barb. 297.	176
†Carratt v. Morley, 1 Q. B. 18.	89, 90
Carroll v. Mix, 51 Barb. 212.	205
Carslake v. Mapledoram, 2 Term R. 473.	116
Carter v. Andrews, 16 Pick. 1, 5, 9.	113, 149
Carter v. Boehm, 3 Burrows, 1905, 1913, 1914.	43
†Carter v. Harden, 78 Me. 528, 7 Atl. Rep. 392.	65
Cary's Case, Poph. 207.	117
†Casey v. Smith, 152 Mass. 294, 25 N. E. Rep. 734.	233
†Castor v. McShaffery, 48 Pa. St. 437.	202
Catlin v. Valentine, 9 Paige, 575.	166, 179
†Cattle v. Water-Works Co., L. R. 10 Q. B. 453.	47
†Cavanagh v. Dinsmore, 12 Hun, 465.	239
Cavey v. Ledbetter, 13 C. B. (N. S.) 470.	165
Cawkwell v. Russell, 26 Law J. Exch. 34.	190
†Central R. Co. of New Jersey v. Moore, 24 N. J. Law, 824.	225
†Chaffee v. Pease, 10 Allen, 537.	23
Chambers v. Caulfield, 6 East, 244.	217
Champer v. State, 14 Ohio St. 437.	74, 75
Chandler v. Thompson, 3 Camp. 82.	3
†Chandler v. Walker, 21 N. H. 282.	155
†Chapman v. Allen, Cro. Car. 271, 272.	156
†Chapman v. Cole, 12 Gray, 141.	201
Chapman v. State, 73 Ala. 463.	50, 73
Chapman v. Thumblethorp, Cro. Eliz. 329.	152
Chase v. Corcoran, 106 Mass. 286, 288.	159
Chase v. Silverstone, 62 Me. 175.	27
Chasemore v. Richards, 7 H. L. Cas. 349, 5 Hurl. & N. 982.	27
†Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. Rep. 168.	258
Cheever v. Pearson, 16 Pick. 273.	159
Chenery v. Goodrich, 98 Mass. 224.	149
Cheney v. Railroad Co., 11 Metc. (Mass.) 121.	79
†Chicago v. Robbins, 2 Black, 418.	242
Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460.	79
†Chicago City Lry. Co. v. Wilcox, (Ill. Sup.) 27 N. E. Rep. 899.	233
†Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184.	247

	Page
Chicago, R. I. & P. Ry. Co. v. Eininger, 114 Ill. 79.	237
Chicago & A. R. v. Flagg, 43 Ill. 364.	79
†Chicago & A. R. Co. v. Pennell, 110 Ill. 435.	48
Chiffer's Case, T. Raym. 275, 276.	78
Child v. Affleck, 9 Barn. & C. 403.	137
Chilton v. Railway Co., 16 Mees. & W. 212.	87
†Chrysler v. Canaday, 90 N. Y. 272.	262
†Churchill v. Holt, 131 Mass. 67.	69
†City of Chicago v. Building Ass'n, 102 Ill. 379.	135
Claffin v. Carpenter, 4 Metc. (Mass.) 530.	159
Clapp v. Thaxter, 7 Gray, 384.	189
Clark v. Bales, 15 Ark. 452.	63
Clark v. Binney, 2 Pick. 113, 116.	125
Clark v. Carlton, 1 N. H. 110.	196
Clark v. Cleveland, 6 Hill, 344.	95, 103
Clark v. Fitch, 2 Wend. 459.	218
Clark v. Foot, 8 Johns. 329.	229
†Clark v. Miller, 54 N. Y. 528.	214
Clark v. Montague, 1 Gray, 446, 448.	103
†Clark v. Peckham, 10 R. I. 35.	155
†Clark v. Wilson, 14 R. I. 11.	215
†Clarke v. May, 2 Gray, 410.	212
Clarke v. Roe, 4 Ir. C. L. 1.	147
Clark's Case, 5 Coke, 64.	87
Clay v. Wood, 5 Esp. 44.	230
Clayards v. Dethick, 12 Q. B. 439.	224
Clement v. Chivis, 9 Barn. & C. 172.	125
†Cleveland Rolling-Mill Co. v. Corrigan, (Ohio Sup.) 20 N. E. Rep. 466.	228
Clifford v. Brooke, 12 Ves. 133.	32
†Clifford v. Cotton-Mills, 146 Mass. 47, 15 N. E. Rep. 84.	183
†Clifford v. Dam, 81 N. Y. 52.	181
Clinton Bridge, 10 Wall. 454, 463.	139
Closson v. Staples, 42 Vt. 209.	105
Clowes v. Potteries Co., L. R. 8 Ch. App. 125.	166, 167
Cockayne v. Hodgkisson, 5 Car. & P. 543.	143
Cockcroft v. Smith, 2 Salk. 642.	76
Codman v. Freeman, 3 Cush. 314.	215
Coffin v. Coffin, 4 Mass. 1.	145
Coggs v. Bernard, 2 Ld. Raym. 909.	60
Coggsell v. Baldwin, 15 Vt. 404.	193
†Cogswell v. Railroad Co., 103 N. Y. 10, 8 N. E. Rep. 537.	189
†Cohen v. Mayor, etc., 113 N. Y. 532, 21 N. E. Rep. 700.	181
Colburn v. Patmore, 1 Crompt. & R. 73.	69
Colby v. Reynolds, 6 Vt. 489.	125
†Cole v. Kegler, 64 Iowa, 59, 19 N. W. Rep. 843.	191
Coles v. Wright, 4 Taunt. 198.	205
Collins v. Commissioners, L. R. 4 C. P. 279.	35
Collins v. Malin, Cro. Car. 382.	118
†Collins v. Railroad Co., 142 Mass. 301, 7 N. E. Rep. 556.	228
†Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427.	175
Commonwealth v. Alger, 7 Cush. 53, 85.	157
Commonwealth v. Carey, 12 Cush. 246, 252.	95, 97
Commonwealth v. Chemical Works, 16 Gray, 231-233.	187
Commonwealth v. Clark, 2 Metc. (Mass.) 23, 25, 77, 78.	73-75
Commonwealth v. Collberg, 119 Mass. 350.	73-75
Commonwealth v. Devlin, 141 Mass. 423, 6 N. E. Rep. 64.	78
Commonwealth v. Essex Co., 13 Gray, 239, 247.	187
†Commonwealth v. Eyre, 1 Serg. & R. 347.	72
Commonwealth v. Kennard, 8 Pick. 133.	78
Commonwealth v. Kidder, 107 Mass. 188.	180, 188
Commonwealth v. Lynn, 123 Mass. 218.	78
Commonwealth v. McCue, 16 Gray, 226, 227.	73
Commonwealth v. McDonough, 13 Allen, 581, 584.	188
Commonwealth v. McDuffy, 126 Mass. 467.	79
Commonwealth v. McKie, 61 Amer. Dec. 410.	73
†Commonwealth v. Miller, 139 Pa. St. 77, 21 Atl. Rep. 138.	170
Commonwealth v. Railroad Co., 14 Gray, 93, 97.	189
Commonwealth v. Randall, 4 Gray, 36.	81
Commonwealth v. Snelling, 15 Pick. 337.	99
Commonwealth v. Stebbins, 8 Gray, 492.	78, 79
†Commonwealth v. Tobin, 108 Mass. 426.	161
Commonwealth v. White, 110 Mass. 407.	71
Commonwealth v. Woodward, 102 Mass. 155, 161.	77

	Page		Page
Connecticut Mut. Life Ins. Co. v. Railroad Co., 25 Conn. 255.....	247	Dent v. Auction Mart Co., 35 Law J. Ch. 555....	166
Conway v. Bush, 4 Barb. 563.....	204	†De Pew v. Robinson, 95 Ind. 109.....	121
Cook v. Stearns, 11 Mass. 533.....	159	Dering v. Earl of Winchelsea, 1 Cox, 318.....	69
Cooke v. Forbes, L. R. 5 Eq. 166.....	166	†Derry v. Peek, L. R. 14 App. Cas. 376.....	11
†Cool v. Crommett, 13 Me. 250.....	162	Devereux v. Barclay, 2 Barn. & Ald. 702.....	204
†Cooper v. Lovering, 106 Mass. 77.....	262	Devine v. Mills, 9 N. Y. 637, <i>mem.</i>	88
Cooper v. Randall, 53 Ill. 24.....	166	†Devlin v. Smith, 89 N. Y. 470.....	67
†Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. Rep. 360.....	258	Devoll v. Brownell, 5 Pick. 448.....	10
Corbett v. Brown, 8 Bing. 33.....	252	Dexter v. Spear, 4 Mason, 115.....	125
Corby v. Hill, 4 C. B. (N. S.) 556.....	230	Deyo v. Stewart, 4 Denio, 101.....	163
Corcoran v. Holbrook, 59 N. Y. 517.....	243	Dicas v. Lord Brougham, 6 Car. & P. 249.....	212
Corning v. Factory, 40 N. Y. 191, 220.....	166	Dickinson v. Barber, 9 Mass. 225.....	51
Cornwall v. Railroad, 8 Fost. (N. H.) 167.....	163	Dickinson v. Worcester, 7 Allen, 19.....	171
†Cottrill v. Railroad Co., 47 Wis. 634, 3 N. W. Rep. 376.....	237	Dietus v. Fuss, 8 Md. 148.....	205
Couch v. Steel, 3 El. & Bl. 402.....	16	†Dingley v. Buffum, 57 Me. 379.....	157
Count Joannes v. Bennett, 5 Allen, 169.....	142	Dixon v. Bell, 5 Maule & S. 198.....	33, 36, 67
Coventry v. Barton, 17 Johns. 142.....	69	Doggett v. Railroad Co., 34 Iowa, 284.....	225
†Cowley v. Smyth, 46 N. J. Law, 380.....	257	Dole v. Erskine, 35 N. H. 503.....	75
†Cowper v. Andrews, Hob. 42.....	156	Dolph v. Ferris, 7 Watts & S. 367.....	153
Coxhead v. Richards, 2 Man., G. & S. *569, *601.....	140	†Donaghue v. Gaffy, 53 Conn. 43, 2 Atl. Rep. 397.....	136
Craft v. Boite, 1 Saund. 243, note.....	127	Donald v. Humphrey, 14 F. (S. C.) 1206.....	165
Crain v. Petrie, 6 Hill, 523, 524.....	122, 149	Doswell v. Impey, 1 Barn. & C. 163.....	212
Crawshay v. Thompson, 4 Man. & G. 357.....	252	Dovaston v. Payne, 2 H. Bl. 527.....	163
†Cristie v. Cowell, Peake, 4.....	115	†Dowling v. Lawrence, 58 Wis. 282, 16 N. W. Rep. 552.....	260
Crittall v. Horner, Hob. 219.....	116	†Dowman's Case, 9 Coke, 11 <i>a</i> , 1 And. 65.....	156
†Crook v. Pitcher, 61 Md. 510.....	135	†Downing v. Dearborn, 77 Me. 457, 1 Atl. Rep. 407.....	260
Cropp v. Tilney, 3 Salk. 226.....	125	Doyle v. Roberts, 3 Bing. N. C. 835.....	119
Cross v. Guthery, 2 Root, 90.....	247	†Drake v. State, (N. J. Sup.) 20 Atl. Rep. 747.....	13 <i>i</i>
Cross v. Kent, 32 Md. 581.....	51	Drewe v. Coulton, 1 East, 563, note.....	20
Crosse v. Gardner, Carth. 90.....	251	†Dubois v. Beaver, 25 N. Y. 123, 128.....	157
Crowley v. Railroad Co., 30 Barb. 99.....	266	Dubois v. Budlong, 15 Abb. Pr. 445.....	179
†Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. Rep. 457.....	121	†Dudley v. Mayhew, 3 N. Y. 9.....	18
Crump v. Lambert, L. R. 3 Eq. 408, 409.....	166	†Dufour v. Anderson, 95 Ind. 302.....	197
Cubitt v. Porter, 8 Barn. & C. 269.....	137	Dufresne v. Hutchinson, 3 Taunt. 117.....	198
†Cuff v. Railroad Co., 35 N. J. Law, 17.....	242	Duke of Grafton v. Hilliard, (not reported).....	165
Cunningham v. Bucklin, 8 Cow. 178.....	212	Duke of Newcastle v. Clark, 8 Taunt. 602.....	212
Currier v. Swan, 63 Me. 323.....	68	†Dun v. Railroad Co., 78 Va. 645.....	226
Curtis v. Carson, 2 N. H. 539.....	76	Dunlap v. Glidden, 31 Me. 435.....	13, 15, 248
Curtis v. Curtis, 10 Bing. 477.....	112	Dunlop v. Munroe, 7 Cranch, 242.....	214
†Curtis v. Hubbard, 4 Hill, 437.....	215	Dunn v. Winters, 2 Humph. 512.....	125
Curtiss v. Hoyt, 19 Conn. 154.....	155	Dunwich v. Sterry, 1 Barn. & Adol. 831.....	159
Dain v. Wycoff, 7 N. Y. 191.....	219	Durrell v. Bederley, Holt, N. P. 283.....	43
†Dalay v. Savage, 145 Mass. 38, 12 N. E. Rep. 841.....	183	†Dyckman v. Valiente, 42 N. Y. 549.....	203
Dale v. Harris, 109 Mass. 196.....	138	Dygert v. Bradley, 8 Wend. 469, 472, 473.....	229, 230
†Daley v. Railroad Co., 26 Conn. 531.....	233	Dygert v. Schenck, 23 Wend. 446.....	180
†Dalton v. Angus, L. R. 6 App. Cas. 740.....	15	Eames v. Worsted Co., 11 Mete. (Mass.) 570.....	188
†Danenboffer v. State, 63 Ind. 235.....	81	Earl v. Van Alstine, 8 Barb. 630.....	192
Daniels v. Potter, 4 Car. & P. 262.....	34	Earl of Lonsdale v. Nelson, 2 Barn. & C. 302, 3 Dow. & R. 556.....	189
Darling v. Williams, 53 Ohio St. 63.....	75	†Eastin v. Bank, 66 Cal. 122, 4 Pac. Rep. 1106.....	106
Daumiel v. Gorham, 6 Cal. 44.....	215	Easton v. Calendar, 11 Wend. 90.....	212
Davies v. Mann, 10 Mees. & W. 546.....	224	†East River Gas-Light Co. v. Donnelly, 93 N. Y. 557.....	212
Davies v. Sneed, L. R. 5 Q. B. 611.....	146	†Edgerly v. Bush, 81 N. Y. 199.....	267
†Davies v. Solomon, L. R. 7 Q. B. 112.....	124	Edgington v. Fitzmaurice, 29 Ch. Div. 459.....	254
Davis v. Clancy, 3 McCord, 422.....	154	Edmonson v. Stevenson, Bull. N. P. 8.....	129
Davis v. Gardiner, 4 Coke, 16 <i>b</i> , 17.....	29, 45	†Edmunds v. Hill, 133 Mass. 445.....	206
†Davis v. Getchell, 50 Me. 602.....	175	†Edmundson v. Railroad Co., 111 Pa. St. 316, 2 Atl. Rep. 404.....	242
Davis v. Hardy, 6 Barn. & C. 225.....	95	Edwards v. Wooton, 12 Coke, 35.....	131
Davis v. Lambertson, 56 Barb. 480.....	166	†Ehrgott v. Mayor, etc., 96 N. Y. 264.....	48
†Davis v. Lottich, 46 N. Y. 395.....	203	Elliot v. Brown, 2 Wend. 497.....	76
Davis v. Nash, 32 Me. 411.....	155	†Ellis v. Buzzell, 60 Me. 209.....	136
†Davis v. Nuzum, 72 Wis. 439, 40 N. W. Rep. 497.....	258	†Ellis v. Gas Co., 2 El. & Bl. 767.....	242
†Davis v. Railroad Co., 143 Mass. 301, 9 N. E. Rep. 815.....	267	Elsee v. Smith, 2 Chit. 304.....	90
Davis v. Saunders, 2 Chit. 639.....	52	†Ely v. Ehle, 3 N. Y. 507.....	193
Davis v. Sawyer, 133 Mass. 289.....	170, 177, 178	†Embrey v. Owen, 6 Exch. 353.....	23, 175
Davis v. Sims, Lalor, Supp. 234.....	205	Emerson v. Peteler, 35 Minn. 481, 29 N. W. Rep. 311.....	227
Davis v. Whitridge, 2 Stro. 232.....	78	Emery v. Hapgood, 7 Gray, 55.....	14, 90
†Daw v. Golding, Cro. Car. 196.....	153	†Engstrom v. Sherburne, 137 Mass. 153.....	110
Dawkins v. Rokeby, L. R. 7 H. L. 744, L. R. 8 Q. B. 255.....	147	†Erie City Iron-Works v. Barber, 106 Pa. St. 125.....	253
Day v. Bach, 87 N. Y. 56.....	91	†Erie City Pass. R. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. Rep. 269.....	233
Dean v. Peel, 5 East, 45.....	218	†Esty v. Wilnot, 15 Gray, 168.....	157
Dean v. Railroad, 2 Fost. (N. H.) 317.....	163	Evans v. Bicknell, 6 Ves. 186.....	31
†Dearbourn v. Bank, 58 Me. 273.....	206	Evans v. Collins, 5 Q. B. 804, 820.....	252
Delahoussaye v. Judice, 13 La. Ann. 557.....	171	Evans v. Edmonds, 13 C. B. 777.....	253, 254
De Lavallette v. Wendt, 75 N. Y. 579.....	267	Evans v. Foster, 1 N. H. 377.....	212
Delegat v. Highley, 3 Bing. N. C. 950.....	100	Evans v. Harlow, 5 Q. B. 624.....	12, 13
†Demarest v. Hardham, 34 N. J. Eq. 469.....	170	†Evans v. Walton, L. R. 2 C. P. 615.....	47
†Dennick v. Railroad Co., 103 U. S. 11.....	267	†Everett v. Henderson, 146 Mass. 89, 14 N. E. Rep. 922.....	93

	Page		Page
Eyre v. Dunsford, 1 East, 318, 329.....	9, 31	Gerber v. Gabel, 16 Ill. 217.....	2
Fall River Iron-Works Co. v. Railroad Co., 5 Allen, 224.....	184	Getting v. Foss, 3 Car. & P. 160.....	144
+Fargis v. Walton, 107 N. Y. 398, 14 N. E. Rep. 303.....	159	Gibbs v. Chase, 10 Mass. 128.....	196
Farmer v. Darling, 4 Burrows, 1971.....	101	Gibbs v. Dewey, 5 Cow. 503.....	111, 112
Farrand v. Marshall, 21 Barb. 421.....	179	Gibs v. Price, Style, 231.....	117
Farwell v. Railroad Corp., 4 Metc. (Mass.) 49.....	245, 247	Gilbert v. Dickerson, 7 Wend. 449.....	203
+Fay v. O'Neill, 36 N. Y. 11.....	103	Gilbert v. People, 1 Denio, 41.....	146
Fay v. Whitman, 100 Mass. 76.....	177	Gillespie v. McGowan, 100 Pa. St. 144.....	8, 237
Fent v. Railroad Co., 59 Ill. 349.....	43	Gillham v. Railroad Co., 49 Ill. 484.....	171
+Fields v. Stokley, 99 Pa. St. 306.....	191	Gillis v. Railroad Co., 59 Pa. St. 129.....	7
+Filbert v. Hoff, 42 Pa. St. 97.....	157	+Gilman v. Emery, 54 Me. 460.....	196
+Filburn v. People's Palace, etc., Co., 25 Q. B. Div. 258.....	194	Gilman v. Philadelphia, 3 Wall. 713, 732.....	189
Fillo v. Jones, 2 Abb. Dec. 121.....	179	+Gilmore v. Driscoll, 122 Mass. 199.....	28
+Findlay v. McAllister, 113 U. S. 104, 5 Sup. Ct. Rep. 401.....	110	+Gilmore v. Newton, 9 Allen, 171.....	206
+First Nat. Bank v. Railroad Co., 58 N. H. 203.....	201	Gizler v. Witzel, 82 Ill. 322.....	75
Fischer v. Raab, 81 N. Y. 235.....	91	Glidden v. Towle, 11 Post. (N. H.) 168.....	163
+Fish v. Dodge, 4 Denio, 311.....	178	+Godeau v. Blood, 52 Vt. 251.....	194
Fish v. Ferris, 5 Duer, 49.....	201	+Godsell v. Fleming, 59 Wis. 52, 17 N. W. Rep. 679.....	191
Fisher v. Bristow, 1 Doug. 215.....	107	Godson v. Home, 1 Brod. & B. 7.....	140
+Fisher v. McGirr, 1 Gray, 45.....	216	Gold v. Bissell, 1 Wend. 210, 19 Amer. Dec. 480.....	90
Fisher v. Mellen, 103 Mass. 503.....	258	Goldstein v. Foss, 6 Barn. & C. 158.....	144
Fitzgerald v. Cavin, 110 Mass. 158.....	75	Goodale v. Tuttle, 29 N. Y. 459, 467.....	27, 171
+Fitzgerald v. Railroad Co., 29 Minn. 336, 13 N. W. Rep. 168.....	233	Goodrich v. Woolcott, 3 Cow. 231, 5 Cow. 714.....	112
+Fitzgerald v. Redfield, 51 Barb. 484.....	121	Goodtitle v. Tombs, 3 Wils. 118.....	157
Flack v. Harrington, 12 Amer. Dec. 170.....	90	+Goodwin v. Wertheimer, 99 N. Y. 149, 1 N. E. Rep. 404.....	206
+Fleetwood v. Commonwealth, 80 Ky. 1.....	98	Goodwyn v. Cheveley, 28 Law J. Exch. 298.....	162
Fleming v. Railway Co., 4 Q. B. Div. 81.....	56	Gordon v. Butler, 105 U. S. 553.....	262
Fletcher v. Rylands, L. R. 1 Exch. 265, L. R. 3 H. L. 330.....	162, 221-223	Gorham v. Gross, 125 Mass. 232, 238.....	51, 223
Flight v. Thomas, 10 Adol. & E. 590.....	2	Gormley v. Sanford, 52 Ill. 158.....	171
Floyd v. State, 54 Amer. Dec. 250.....	90	+Gorris v. Scott, L. R. 9 Exch. 125.....	18
Floyd and Barker, Case of, 12 Coke, 23, 25.....	207, 212	Gorton v. De Angelis, 6 Wend. 418.....	98
+Folger v. Washburn, 137 Mass. 60.....	102	Gorton v. Frizzell, 20 Ill. 291.....	90
Foot v. Brown, 8 Johns. 54.....	120	Goslin v. Wilcock, 2 Wils. 302, 305, 307.....	102, 105
+Forbes v. Hagman, 75 Va. 168.....	102	Gould v. Duck Co., 13 Gray, 443.....	174
+Forbes v. Railroad Co., 133 Mass. 154.....	201	Govett v. Radnidge, 3 East, 62.....	56
Ford v. Monroe, 20 Wend. 210.....	247	Grafton, Duke of v. Hilliard, (not reported).....	165
+Ford v. Primrose, 5 Dowl. & R. 288.....	115	Grant v. Moser, 5 Man. & G. 123.....	96
Former v. Geldmecher, 13 Reporter, 790.....	40	+Grant v. Power Co., 14 R. I. 380.....	18
Fortman v. Rottier, 8 Ohio St. 548.....	106	+Graves v. Dawson, 133 Mass. 419.....	103
Foshay v. Ferguson, 2 Denio, 617.....	95, 98	Greason v. Keteltas, 17 N. Y. 496.....	192
Foss v. Hildreth, 10 Allen, 76.....	136	Green v. Dunn, 3 Camp. 215.....	205
Foster v. Charles, 7 Bing. 105.....	251, 252, 254	Green v. Elgie, 5 Q. B. 99.....	90
+Fouldes v. Willoughby, 8 Mees. & W. 540.....	196	Green v. Goddard, 3 Salk. 641.....	78, 152
Foulkes v. Railway Co., 4 C. P. Div. 267, 5 C. P. Div. 157.....	56	Green v. Railroad Co., *41 N. Y. 294, 2 Abb. Dec. 277.....	247
Fowle v. Robbins, 12 Mass. 498.....	149	Green v. Sperry, 16 Vt. 390.....	201
Fowler v. Hollins, L. R. 7 H. L. 757, L. R. 7 Q. B. 616.....	199	Greene v. Jones, 1 Saund. 296, note 1.....	152
Fowles v. Bowen, 30 N. Y. 20.....	144	Greenland v. Chaplin, 5 Exch. 243, 248.....	35
+Francis v. Schoellkopf, 53 N. Y. 152.....	185	Greenway v. Fisher, 1 Car. & P. 190.....	205
Fray v. Blackburn, 3 Best & S. 576.....	208	Gregory v. Hill, 8 Term R. 299.....	76, 77, 152
Frazier v. Brown, 12 Ohio St. 294.....	27	+Gregory v. Piper, 9 Barn. & C. 591.....	153
Freeman v. Arkell, 2 Barn. & C. 494, 3 Dowl. & R. 669.....	103	+Grider v. Tally, 77 Ala. 422.....	214
+French v. Vining, 102 Mass. 132.....	260	+Griffith v. McCullum, 46 Barb. 561.....	191
+Friend v. Hamill, 34 Md. 298.....	212	Grinham v. Willey, 4 Hurl. & N. 496.....	89
Frost v. Railroad Co., (N. H.) 9 Atl. Rep. 720.....	227	Grinnell v. Wells, 7 Man. & G. 1033.....	218
Fuller v. Chamberlain, 11 Metc. (Mass.) 503.....	68	Grove v. Brandenburg, 7 Blackf. 234.....	248
Fuller v. Fenner, 16 Barb. 333.....	124	+Grove v. Van Duyn, 44 N. J. Law, 654.....	212
Fuller v. Jewett, 80 N. Y. 46.....	220	Grumon v. Raymond, 1 Conn. 40.....	90
Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648.....	213	Guile v. Swan, 19 Johns. 381, 382.....	37, 38, 40, 195, 196
Gage v. Whittier, 17 N. H. 312.....	205	+Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. Rep. 62.....	155
Galena & C. U. R. Co. v. Yarwood, 15 Ill. 468.....	225	Gwinne v. Pool, Lutw. 290.....	212
+Galligan v. Manufacturing Co., 143 Mass. 527, 10 N. E. Rep. 171.....	8	+Hadley v. Clinton, etc., Co., 13 Ohio St. 502.....	260
+Galvin v. Bacon, 11 Me. 28.....	206	+Hager v. Danforth, 20 Barb. 16.....	161
Gannon v. Hargadon, 10 Allen, 106.....	171	+Haggerty v. Wilber, 16 Johns. 287.....	215
Gardner v. Village of Newburgh, 2 Johns. Ch. 162.....	21, 22	Hair v. Little, 28 Ala. 238.....	68
Garing v. Fraser, 76 Me. 37.....	104, 110	Haldeman v. Martin, 10 Pa. St. 369.....	15
Garnett v. Ferrand, 6 Barn. & C. 611.....	212	Hall v. Fisher, 20 Barb. 441.....	98
Gassett v. Gilbert, 6 Gray, 94.....	138	Hall v. Hollander, 4 Barn. & C. 660.....	229
Gates v. Lounsbury, 20 Johns. 427.....	76	+Hall v. Smith, 2 Bing. 156.....	3
+Gauvreau v. Publishing Co., 62 Wis. 403, 22 N. W. Rep. 726.....	121	Hall v. Smith, 7 Leg. Int. 7.....	101
Gavett v. Railroad Co., 16 Gray, 501.....	225	Hall v. Snowhill, 14 N. J. Law, 8.....	154
+Geary v. Bennett, 53 Wis. 444, 10 N. W. Rep. 662.....	115	+Hall v. Suydam, 6 Barb. 83.....	102
		Halsey v. Woodruff, 9 Pick. 555.....	68
		Hamar v. Alexander, 2 Bos. & P. 241.....	31
		Hamilton v. Eno, 81 N. Y. 116.....	139, 145
		Hammaek v. White, 11 C. B. (N. S.) 5-8.....	222
		Hardcastle v. Railway Co., 4 Hurl. & N. 67.....	7, 8
		Harding v. Larned, 4 Allen, 426.....	51
		Harding v. Weld, 128 Mass. 587, 591.....	51
		Hargrave v. Le Breton, 4 Burrows, 2425.....	130
		+Harlan v. Railroad Co., 65 Mo. 22.....	226
		Harman v. Brotherson, 1 Denio, 537.....	92

	Page		Page
†Harman v. Delany, 2 Strange, 898.....	12	Holwood v. Hopkins, Cro. Eliz. 787.....	45
Harman v. Tappenden, 1 East, 555.....	20	Homer v. Thwing, 3 Pick. 492.....	201
Harmon v. Harmon, 61 Me. 222.....	151	Hood v. Palm, 8 Pa. St. 237.....	15
Harris v. Butler, 2 Mees. & W. 539.....	218	Horbach's Adm'rs v. Elder, 18 Pa. St. 33.....	69
Harris v. Thompson, 13 C. B. 333.....	144	Hornketh v. Barr, 8 Serg. & R. 36.....	219
†Harrisburg, The, 119 U. S. 199, 7 Sup. Ct. Rep. 140.....	248	†Hostler's Case, Yelv. 67.....	156
Harrison v. Bush, 5 El. & Bl. 344.....	137, 139, 144	Hotchkiss v. Porter, 30 Conn. 414.....	138
Harrison v. Railway Co., 3 Hurl. & C. 231, 33 Law J. Exch. 266.....	35	†Hough v. Railway Co., 100 U. S. 213.....	244
Hart v. Aldridge, Cowp. 54.....	46	Hounsell v. Smyth, 7 C. B. (N. S.) 731.....	7, 220
Hartfield v. Roper, 21 Wend. 615.....	231, 232, 233	Hover v. Barkhoof, 44 N. Y. 113.....	16, 213
†Hartford v. Brady, 114 Mass. 466.....	162	†Howard v. Clarke, 20 Q. B. Div. 558.....	95
Hartshorn v. South Reading, 3 Allen, 501.....	184	Howard v. Manderfield, 31 Minn. 337, 17 N. W. Rep. 946.....	215
Hartzall v. Sill, 12 Pa. St. 248.....	174, 175	†Howe v. Newmarch, 12 Allen, 49.....	239
Harvard College v. Stearns, 15 Gray, 1.....	184	Howell v. Jackson, 6 Car. & P. 723.....	97
†Harvey v. Dunlop, Lalor, Supp. 193.....	53	†Howitt v. Estelle, 92 Ill. 218.....	206
Harwood v. Lowell, 4 Cush. 310.....	161	Hoy v. Sterrett, 2 Watts, 327.....	174, 175
Harwood v. Siphers, 70 Me. 464.....	90	Hoye v. Bush, 1 Man. & G. 775.....	90
Haskell v. New Bedford, 108 Mass. 208, 215.....	188	Hoyt v. Hudson, 27 Wis. 656.....	171
†Haskins v. Royster, 16 Amer. Rep. 780.....	47	Hoyt v. Macon, 2 Colo. 113.....	105
†Hastings v. Livermore, 7 Gray, 194.....	23	†Hubbard v. Mace, 17 Johns. 127.....	161
Hastings v. Lusk, 22 Wend. 410.....	146	Hubgh v. Railroad Co., 6 La. Ann. 495.....	248
Hastings v. Palmer, 20 Wend. 225.....	122	Hucknistine's Appeal, 70 Pa. St. 103.....	166
Hatch v. Railroad, 28 Vt. 142, 147.....	187	†Huddleston v. West Bellevue, 111 Pa. St. 110, 2 Atl. Rep. 200.....	68
†Hathorn v. Spring Co., 44 Hun, 608.....	136	Huggett v. Montgomery, 2 Bos. & P. N. R. 446.....	52
Hay v. Cohoes Co., 3 Barb. 42, 2 N. Y. 159.....	179	†Hughes v. McDonough, 43 N. J. Law, 459.....	48
Haycraft v. Creasy, 2 East, 92, 104.....	31, 51, 251	Hughes v. Macfie, 2 Hurl. & C. 744, 33 Law J. Exch. 177.....	34
†Hayden v. Manufacturing Co., 29 Conn. 548.....	244	†Hull v. Bartlett, 49 Conn. 64.....	82
†Hayes v. Ball, 72 N. Y. 418.....	115	Hume v. Oldacre, 1 Starkie, 351.....	68
†Hayes v. Waldron, 44 N. H. 580.....	116	Humphreys v. County of Armstrong, 56 Pa. St. 204.....	68
Hays v. Hays, 19 La. 351.....	171	†Humphreys v. Mears, 1 Man. & R. 187.....	63
†Hays v. People, 1 Hill, 351.....	71	Humphries v. Parker, 52 Me. 502.....	99
†Haythorn v. Rushforth, 19 N. J. Law, 160.....	196	Hunt v. Bennett, 19 N. Y. 173.....	126
†Hazard v. Harding, 63 How. Pr. 326.....	108	Hunt v. Dowman, Cro. Jac. 478, 2 Rolle, 21.....	20
Heath v. Randall, 4 Cush. 195.....	158	Hunt v. Hunt, 72 N. Y. 218.....	266
†Heaven v. Pender, 11 Q. B. Div. 503.....	67, 220	Hunter v. State, 40 N. J. Law, 495.....	200
Heenan v. Dewar, 18 Grant, Ch. 438.....	167	Hurd v. Railroad Co., 25 Vt. 122.....	163
Heeney v. Sprague, 11 R. I. 456.....	16	Hutchins v. Brackett, 2 Fost. (N. H.) 252.....	214
†Heermance v. James, 47 Barb. 120.....	217	Hutchins v. Hutchins, 7 Hill, 104.....	11, 110
Heermance v. Vernoy, 6 Johns. 5.....	152	Hutchins v. Smith, 63 Barb. 251.....	166
Henderson v. Broomhead, 4 Hurl. & N. 569.....	14	Hutchinson v. Railway Co., 5 Exch. 343.....	245
Henn's Case, W. Jones, 296.....	160	Hutson v. Mayor, etc., 9 N. Y. 169.....	213
Herbert and Stroud's Case, Cro. Car. 210.....	83	Hyatt v. Adams, 16 Mich. 180.....	247
Hermann v. Railroad Co., 11 La. Ann. 5.....	248	Hyatt v. Wood, 4 Johns. 150.....	76
Herring v. Finch, 2 Lev. 250.....	20	†Hyde v. Greuch, 62 Md. 577.....	107
Hetrich v. Deachler, 6 Pa. St. 32.....	174, 175	Hyde v. Stone, 9 Cow. 230.....	203
†Hewit v. Mason, 24 How. Pr. 366.....	116	Hydraulic Works Co. v. Orr, 83 Pa. St. 332, 5, 6, 7, 8	
†Heywood v. Tillson, 75 Me. 225.....	11	Illidge v. Goodwin, 5 Car. & P. 190, 192.....	33, 34, 67
Hibbard v. Railroad Co., 15 N. Y. 455.....	86	Ilott v. Wilkes, 3 Barn. & Ald. 304, 308.....	33, 193
Hicke's Case, Poph. 139, Hob. 215.....	131	Ince v. Ferry Co., 106 Mass. 149.....	224
Hickey v. Railroad Co., 14 Allen, 429.....	225	†Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311.....	220
†Hicks v. Faulkner, 8 Q. B. Div. 167, 46 Law T. (N. S.) 127.....	101	Indianapolis, P. & C. R. Co. v. Keely, 23 Ind. 133.....	247
Higgins v. Dewey, 107 Mass. 494.....	43	†Ingwersen v. Rankin, 47 N. J. Law, 18.....	183
Higgins v. Turnpike Co., 46 N. Y. 23.....	238	†Inland & Seaboard Coasting Co. v. Tolson, 159 U. S. 551, 11 Sup. Ct. Rep. 653.....	226
Higginson v. York, 5 Mass. 341.....	195	Ireland v. Higgins, Cro. Eliz. 125.....	194
†Hildebrand v. McCrum, 101 Ind. 61.....	86	†Isaack v. Clark, 2 Bulst. 312.....	156
Hill v. Balls, 2 Hurl. & N. 299.....	259	Isack v. Clarke, 1 Rolle, 60, 130.....	156
Hill v. Goodchild, 5 Burrows, 2790.....	68	†Isbell v. Railroad Co., 27 Conn. 393.....	226
Hill v. New River Co., 9 Best & S. 303.....	34	†Jackson v. Adams, 2 Bing. N. C. 402, 2 Scott, 599.....	115
Hill v. Railroad Co., 55 Me. 438.....	43	Jackson v. Pesked, 1 Maule & S. 235.....	20
Hill v. Sayles, 12 Cush. 454.....	176	Jackson v. Railroad Co., 47 N. Y. 274.....	239
Hillhouse v. Dunning, 6 Conn. 391.....	125	†Jacobsen v. Sidal, 12 Or. 280, 7 Pac. Rep. 108.....	217
Hilliard v. Gool, 34 N. H. 230.....	79	J'Anson v. Stuart, 1 Term. R. 748.....	125
†Hilliard v. Richardson, 3 Gray, 349.....	242	†Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. Rep. 590.....	80
Hinckley v. Emerson, 4 Cow. 351.....	153	Jay v. Whitfield, cited in 3 Barn. & Ald. 308.....	34
Hingham v. Sprague, 15 Pick. 102.....	155	Jeffrey v. Bigelow, 13 Wend. 518.....	259
Hoar v. Wood, 3 Metc. (Mass.) 193.....	14	†Jeffries v. Railroad Co., 5 El. & Bl. 802.....	202
Hobbs v. Branscomb, 3 Camp. 420.....	94	Jendwine v. Slade, 2 Esp. 572.....	262
†Hobbs v. Escott, 2 Sid. 40.....	156	Jenkins v. Turner, 1 Ld. Raym. 109.....	153
Hobson v. Todd, 4 Term. R. 71, 73.....	21	Jennings v. Rundall, 8 Term. R. 337.....	250
Hodgeden v. Hubbard, 18 Vt. 504.....	78	†Jenoure v. Delmege, [1891,] App. Cas. 73.....	145
†Hogg v. Ward, 3 Hurl. & N. 417.....	95	Jerome v. Ross, 7 John. Ch. 315.....	21
†Holbrook v. Connor, 60 Me. 578.....	262	Jesser v. Gifford, 4 Burrows, 2141.....	154
†Holden v. Railroad Co., 129 Mass. 268.....	247	Jessup v. Carnegie, 80 N. Y. 441.....	266
Hole v. Barlow, 4 C. B. (N. S.) 336.....	165	Jetter v. Railroad Co., 2 Abb. Dec. 458.....	16
Holladay v. Fowler, 3 Wend. 147.....	163	†Jewell v. Mahood, 44 N. H. 474.....	157
†Hollins v. Marsh, L. R. 7 H. L. 757.....	50, 201	Jewell v. Railway Co., 55 N. H. 84.....	54
†Hollis v. Meux, 69 Cal. 625, 11 Pac. Rep. 248.....	147		
Holman v. Townsend, 13 Metc. (Mass.) 297, 299.....	184		
†Holmes v. Corthell, 80 Me. 31, 12 Atl. Rep. 730.....	185		
Holmes v. Railway Co., L. R. 6 Exch. 123.....	220		
Holmes v. Seely, 19 Wend. 507.....	154, 160		
Holmes v. Wakefield, 12 Allen, 580.....	239		
†Holzman v. Bleaching Co., 14 N. J. Eq. 335.....	176		
Holyday v. Morgan, 28 Law J. Q. B. 9.....	264		

	Page		Page
Jewett v. Locke, 6 Gray, 233.....	103	Laumier v. Francis, 23 Mo. 181.....	171
Joannes v. Bennett, 5 Allen, 169.....	142	Lavery v. Snetthen, 68 N. Y. 522.....	200
Joannes v. Burt, 6 Allen, 236.....	127	†Lavery v. Crooke, 62 Wis. 612, 9 N. W. Rep. 599.....	219
John Matrever's Case, 30 Ass. pl. 38.....	156	Lawrence v. Hagerman, 56 Ill. 68.....	105
Johnson v. Patterson, 14 Conn. 1.....	8	†Lawrence v. Spence, 99 N. Y. 669, 2 N. E. Rep. 145.....	219
Johnson v. Perry, 56 Vt. 703.....	78	Lawson v. State, 30 Ala. 14.....	70
Johnson v. Robertson, 5 Port. (Ala.) 486.....	120	†Layton v. Harris, 3 Har. (Del.) 406.....	128
†Johnson v. Skillman, 29 Minn. 95, 12 N. W. Rep. 149.....	159	†Leader v. Moxton, 3 Wils. 461.....	25
Johnston v. Altham, Gilb. Ch. 82.....	156	Leame v. Bray, 3 East, 593, 595, 597.....	50, 52, 229
†Johnston v. Disbrow, 47 Mich. 59, 10 N. W. Rep. 79.....	217	†Leavitt v. Fletcher, 60 N. H. 182.....	265
Jones v. Baker, 7 Cow. 445.....	110	Ledley v. Hays, 1 Cal. 160.....	215
†Jones v. Brown, 54 Iowa, 74, 6 N. W. Rep. 140	212	Lee v. Bayes, 18 C. B. 599, 607.....	205
Jones v. Givin, Gilb. 185, 230.....	403	Lee v. Gansel, Cowp. 1.....	161
Jones v. Perry, 2 Esp. 482.....	192	†Lee v. Kendall, 11 N. Y. Supp. 131, 56 Hun, 610.....	110
†Jones v. Powell, Palmer, 536.....	25	Lee v. Robinson, 25 Law J. C. P. 249, 18 C. B. 599.....	205
Jordan v. Lyster, Cro. Eliz. 273.....	118	†Le Forest v. Tolman, 117 Mass. 109.....	267
Jordin v. Crump, 8 Mees. & W. 782.....	33	†Lehigh Val. R. Co. v. Greiner, 113 Pa. St. 600, 6 Atl. Rep. 246.....	225
†Joyce v. Martin, 15 R. I. 555, 10 Atl. Rep. 620	183	Le Maistre v. Hunter, Brightly, N. P. 498.....	101
Juchter v. Boehm, 67 Ga. 534.....	105	†Lent v. Railroad Co., 120 N. Y. 467, 24 N. E. Rep. 653.....	225
†Kaucher v. Blinn, 29 Ohio St. 62.....	116	Leonard v. Collins, 70 N. Y. 90.....	243
Kauffman v. Griesemer, 26 Pa. St. 407.....	171	†Leonard v. Columbia, etc., Co., 84 N. Y. 48.....	248
Keenholts v. Becker, 3 Denio, 346.....	122, 124	Levy v. Langridge, 4 Mees. & W. 337.....	163, 64
Keffe v. Railroad Co., 21 Minn. 207.....	226, 227	Lewis v. Chapman, 16 N. Y. 369.....	126, 143
Keller v. Railroad Co., 2 Abb. Dec. 480.....	42	†Lewis v. Clark, 59 Vt. 363, 8 Atl. Rep. 158.....	203
Kellogg v. Railroad Co., 26 Wis. 224.....	43	Lienow v. Ritchie, 8 Pick. 235.....	154
†Kelly v. Howell, 41 Ohio St. 438.....	67	†Like v. McKinstry, 3 Abb. Dec. 62.....	150
Kelly v. Partington, 5 Barn. & Adol. 645.....	123	†Liles v. Gaster, 42 Ohio St. 631.....	147
Kelly v. Tilton, 2 Abb. Dec. 495.....	192	†Limpus v. Omnibus Co., 1 Hurl. & C. 526.....	239
Kelly v. West, 80 N. Y. 139.....	267	Lincoln v. Hapgood, 11 Mass. 350.....	20
Kendall v. Stone, 5 N. Y. 14.....	122	†Lindsay v. Horton, 27 Conn. 58.....	128
Kerle v. Osgood, 1 Vent. 50.....	117	†Linnehan v. Sampson, 126 Mass. 506.....	237
Kerwhaker v. Railroad Co., 3 Ohio St. 188.....	61	Little v. Hackett, 116 U. S. 363, 6 Sup. Ct. Rep. 391.....	235, 236
Keyworth v. Hill, 3 Barn. & Adl. 655.....	204	Little v. Lathrop, 5 Greenl. 356.....	163
Kidder v. Parkhurst, 3 Allen, 393.....	14	Livingston v. McDonald, 21 Iowa, 160.....	171
†Kiff v. Youmans, 86 N. Y. 324.....	77	†Lobdell v. Stowell, 51 N. Y. 70.....	203
Kilham v. Ward, 2 Mass. 236.....	20	Lock v. Ashton, 12 Q. B. 871.....	90
Kimball v. Billings, 55 Me. 147.....	205	†Lockhart v. Geir, 54 Wis. 133, 11 N. W. Rep. 254.....	159
King v. Lake, 2 Vent. 28.....	117	†Lockwood Co. v. Lawrence, 77 Me. 297.....	176
†King v. Patterson, 49 N. J. Law, 417, 9 Atl. Rep. 705.....	145	Logan v. Austin, 1 Stew. (Ala.) 476.....	74
King v. Railroad Co., 66 N. Y. 181, 184.....	240	Lombard v. Oliver, 5 Gray, 8.....	103
King v. Root, 4 Wend. 114, 139.....	134	†London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45.....	189
†Kingsbury v. Bradstreet Co., 116 N. Y. 211, 22 N. E. Rep. 365.....	126, 145	†Long v. Warren, 68 N. Y. 426.....	11
†Kirk v. Gregory, 1 Exch. Div. 55.....	196	†Longmeid v. Holliday, 6 Exch. 707, 6 Law & Eq. 562.....	65, 67
†Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. Rep. 139.....	258	Lonsdale, Earl of, v. Nelson, 2 Barn. & C. 302, 3 Dow. & R. 556.....	189
Klinck v. Colby, 46 N. Y. 427.....	139, 147	Looney v. McLean, 129 Mass. 33.....	51
†Klumph v. Dunn, 66 Pa. St. 141.....	115	Lord v. Wormwood, 29 Me. 282.....	163
Knauss v. Brua, 107 Pa. St. 55.....	181	†Lord Cromwell's Case, 4 Coke, 13.....	115
Knight v. Abert, 6 Pa. St. 472.....	7	Losee v. Buchanan, 51 N. Y. 476.....	223
†Knight v. Railroad Co., 108 Pa. St. 250.....	267	†Losee v. Clute, 51 N. Y. 494.....	65
Knot v. Gay, 1 Root, 56.....	97	†Loughlin v. State, 105 N. Y. 159, 11 N. E. Rep. 371.....	247
†Knox v. Tucker, 48 Me. 373.....	163	Lovett v. Railroad Co., 9 Allen, 557.....	239
Kohn v. Lovett, 44 Ga. 251.....	7	†Lowe v. Wartman, 47 N. J. Law, 413, 1 Atl. Rep. 459.....	103
Kolsti v. Railroad Co., 32 Minn. 133, 19 N. W. Rep. 655.....	227	Lucas v. Railroad Co., 6 Gray, 64.....	225
Koney v. Ward, 36 How. Fr. 255.....	193	Ludwig v. Pillsbury, 35 Minn. 256, 28 N. W. Rep. 505.....	227
Kramer v. Railroad Co., 25 Cal. 434.....	247	†Lumby v. Allday, 1 Cromp. & J. 301.....	121
Kramer v. Stock, 10 Watts, 115.....	105	Lumley v. Gye, 2 El. & Bl. 216, 247, 22 Law J. Q. B. 403.....	46-48, 110
Kraushaar v. Meyer, 72 N. Y. 602.....	267	Luscombe v. Steer, 17 Law T. (N. S.) 229.....	165, 166
Krebs v. Oliver, 12 Gray, 239.....	142	Luse v. Jones, 39 N. J. Law, 707.....	200
†Laherty v. Hogan, 13 Daly, 533.....	194	Luther v. Winnisimmet Co., 9 Cush. 171.....	171
Lakin v. Ames, 10 Cush. 198.....	151	†Lybe's Appeal, 106 Pa. St. 626.....	28
†Lamb v. Stone, 11 Pick. 526.....	15	Lyke v. Van Leuven, 4 Denio, 127.....	152
Lampet v. Starkey, 10 Coke, 46.....	151	Lyle v. Clason, 1 Caines, 581.....	131
Lancaster County Nat. Bank v. Moore, 78 Pa. St. 407, 412.....	51	Lynch v. Knight, 9 H. L. Cas. 577, 589, 595.....	28, 29, 48, 124
Lander v. Seaver, 32 Vt. 123.....	81	†Lynch v. McNally, 73 N. Y. 347.....	194
Landt v. Hiltz, 19 Barb. 283.....	92	Lynch v. Mayor, etc., 76 N. Y. 60.....	171
Lane v. Cotton, 1 Ld. Raym. 646, 12 Mod. 472.....	214	†Lynch v. Nurdin, 1 Adol. & E. (N. S.) 29; 1 Q. B. 29.....	34, 40, 67
†Lange v. Benedict, 73 N. Y. 12.....	212	Lynch v. Railway Co., 24 Hun, 506.....	86
†Langford v. Railroad Co., 144 Mass. 431, 11 N. E. Rep. 697.....	104	Lyons v. Martin, 8 Adol. & E. 512.....	238
†Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 337.....	67	McAdams v. Cates, 24 Mo. 223.....	250
Laning v. Railroad Co., 49 N. Y. 522.....	242		
†Lanning v. Railroad Co., 49 N. Y. 523.....	247		
†Lansing v. Stone, 37 Barb. 15.....	53		
Larmore v. Iron Co., 101 N. Y. 391, 4 N. E. Rep. 752; 31 Hun, 87, mem.....	5, 219		
†Larson v. Furlong, 50 Wis. 681, 8 N. W. Rep. 1; 63 Wis. 323, 23 N. W. Rep. 584.....	191		

	Page		Page
McAllister v. Hammond, 6 Cow. 342.....	229	Mercer v. Sparks, Noy, 35.....	129
McAlpin v. Powell, 70 N. Y. 126.....	5	Mercer v. Walmsley, 5 Har. & J. 27.....	219
McAndrews v. Burns, 39 N. J. Law, 117.....	247	Merchants' Bank v. State Bank, 10 Wall. 604.....	225
†McAndrews v. Collier, 42 N. J. Law, 189.....	180	Merrifield v. Worcester, 110 Mass. 216, 219.....	186
†McCafferty v. Railroad Co., 61 N. Y. 178.....	242	Merritt v. Brinkerhoff, 17 Johns. 306, 320.....	174, 175
†McCaffrey's Appeal, 105 Pa. St. 253.....	170	Merryweather v. Nixan, 8 Term R. 186.....	69
McCardle v. McGinley, 86 Ind. 538.....	105	Messenger v. Dennie, 141 Mass. 335, 5 N. E. Rep. 283.....	227
†McCarthy v. De Armit, 99 Pa. St. 63.....	95	†Messinger's Appeal, 109 Pa. St. 285, 4 Atl. Rep. 162.....	175
McClurg v. Ross, 5 Bin. 218.....	125	†Meyer v. Amidon, 45 N. Y. 169.....	257
McCorkle v. Binns, 5 Bin. 345.....	125	†Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. Rep. 41.....	132
McCormick v. Sisson, 7 Cow. 715.....	98	Milan, The, Lush, 388.....	235
McCullough v. Com., 67 Pa. St. 32.....	97	Millen and Fawdry's Case, Latch. 120.....	152
McDonald v. Mallory, 77 N. Y. 547.....	266	Miller v. Adams, 7 Lans. 133, 52 N. Y. 409.....	90, 92
McDonald v. Rooke, 2 Bing. N. C. 217, 2 Scott, 359.....	103	Miller v. Baker, 1 Metc. (Mass.) 27.....	196
†Macdougall v. Knight, 17 Q. B. Div. 636.....	145	†Miller v. David, L. R. 9 C. P. 118.....	12
McGregor v. Thwaites, 3 Barn. & C. 24.....	125	Miller v. Fenton, 11 Paige, 18.....	69
McKay v. State, 44 Tex. 43.....	71	Miller v. Laubach, 47 Pa. St. 154.....	172
†McKeon v. See, 51 N. Y. 300.....	178	†Miller v. Mayor, etc., 109 U. S. 355, 3 Sup. Ct. Rep. 228.....	189
†Mackerney v. Erwin, Hut. 101.....	156	Miller v. Miller, 8 Johns. 74, 77.....	112
McKown v. Hunter, 30 N. Y. 627.....	98	†Miller v. Woodhead, 36 Hun, 643, <i>new</i>	4
McLaughlin v. Cowley, 127 Mass. 316.....	146	Milliken v. Thorndike, 103 Mass. 382.....	258
†McLeod v. Railroad Co., 58 Vt. 727, 6 Atl. Rep. 648.....	267	Mills v. City of Brooklyn, 32 N. Y. 489.....	213
McManus v. Crickett, 1 East, 106.....	238	†Ming v. Woolfolk, 116 U. S. 593, 6 Sup. Ct. Rep. 459.....	32
McMorris v. Simpson, 21 Wend. 610.....	198	†Minors v. Leeford, Cro. Jac. 114.....	115
McNamee v. Minke, 49 Md. 122.....	105	Mires v. Solebay, 2 Mod. 242, 245.....	205
†McNay v. Stratton, 9 Ill. App. 215.....	86	Mr. of St. Mark's Case, 7 Edw. III. 8b.....	156
McPherson v. Daniels, 10 Barn. & C. 269.....	122	†Mitchell v. Crassweiler, 13 C. B. 237.....	239
†McPherson v. Runyon, 41 Minn. 524, 43 N. W. Rep. 392.....	106	Mitchell v. State, 54 Amer. Dec. 253.....	90
Madrazo v. Willes, 3 Barn. & Ald. 353.....	267	Mitchell v. Wall, 111 Mass. 492.....	99
Magee v. Scott, 9 Cush. 148.....	205	Mitchell v. Williams, 11 Mees. & W. 205.....	103
Magnin v. Dinsmore, 70 N. Y. 410.....	200	Moens v. Heyworth, 10 Mees. & W. 157.....	252
Mahan v. Brown, 13 Wend. 261.....	2, 60	Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598.....	110
†Mairs v. Real-Estate Ass'n, 89 N. Y. 498.....	153	Mohawk & H. R. Co. v. Artcher, 6 Paige, 83.....	166
Malachy v. Soper, 3 Bing. N. C. 371, 383, 386.....	12, 13, 150	†Monongahela City v. Fischer, 111 Pa. St. 9, 2 Atl. Rep. 87.....	225
Mali v. Lord, 39 N. Y. 381.....	238	Moody v. Baker, 5 Cow. 351, 354.....	150
†Manders v. Williams, 4 Exch. 339.....	202	Mooney v. Miller, 102 Mass. 220.....	265
†Mangan v. Railroad Co., 38 N. Y. 455.....	233	†Moore v. Bank, 4 N. Y. S. 378.....	145
Mangan v. Atterton, 4 Hurl. & C. 388, L. R. 1 Exch. 239.....	36	†More v. Perry, 61 Mo. 174.....	155
†Mangold v. Thorpe, 33 N. J. Law, 134.....	216	†Morey v. Fitzgerald, 56 Vt. 487.....	161
Mann v. President, etc., 91 N. Y. 500.....	242, 243	Morgan v. City of Hallowell, 57 Me. 377.....	7
Mannville Co. v. Worcester, 138 Mass. 89.....	267	Morgan v. Hughes, 8 Term R. 225, 232.....	103
†Marble v. Chapin, 132 Mass. 225.....	132	Morgan v. Lingen, 8 Law T. (N. S.) 800.....	127
Marbourg v. Smith, 11 Kan. 554.....	105	Morgan v. Varick, 8 Wend. 587.....	196
Marcy v. Marcy, 32 Conn. 308.....	267	†Morley v. Chase, 143 Mass. 396, 9 N. E. Rep. 767.....	95
†Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643.....	181	Morris v. Langdale, 2 Bos. & P. 284.....	44, 150
Marks v. Townsend, 97 N. Y. 590, 599.....	92	Morse v. Crawford, 17 Vt. 499.....	51
Marsh v. Ellsworth, 50 N. Y. 309.....	146, 147	Mostyn v. Fabrigas, Cowp. 161.....	267
†Marsh v. Falke, 40 N. Y. 562.....	262	Mott v. Ice Co., 73 N. Y. 543.....	88, 239
†Marshall v. Heller, 55 Wis. 392, 11 N. W. Rep. 236.....	86	†Moulton v. Water Co., 137 Mass. 163.....	175
Marshall v. Railroad Co., 11 C. B. 655.....	56	Mount Morris Square, etc., In re, 2 Hill, 14, 21, 22.....	212
Martin v. Payne, 9 Johns. 387.....	218	†Mowry v. Chase, 100 Mass. 79.....	86
Martin v. Riddle, 26 Pa. St. 415.....	171	†Muggridge v. Eveleth, 9 Metc. (Mass.) 233.....	197
Martin v. Stillwell, 13 Johns. 275.....	111	Muldoon v. Rickey, 103 Pa. St. 110.....	105
†Marts v. State, 26 Ohio St. 162.....	77	†Mulherrin v. Railroad Co., 81 Pa. St. 375.....	6
Martyn v. Burlings, Cro. Eliz. 589.....	120	†Muller v. McKesson, 10 Hun, 44.....	191
Marzetti v. Williams, 1 Barn. & Adol. 415.....	21	Mulligan v. Elias, 12 Abb. P. (N. S.) 2.9.....	167
Mason v. Hill, 2 Nev. & M. 747; 7 Barn. & Adol. 304; 5 Barn. & Adol. 1.....	21, 22, 176	Mulry v. Insurance Co., 5 Gray. 741.....	43
Mason v. Keeling, 1 Ld. Raym. 606, 12 Mod. 332.....	153	Munn v. Illinois, 94 U. S. 113-134.....	187
Masser v. Railroad Co., 68 Iowa, 602, 27 N. W. Rep. 776.....	227	Munns v. Dupont, 3 Wash. C. C. 37.....	95, 100
Masten v. Deyo, 2 Wend. 424.....	95	†Munster v. Lamb, 11 Q. B. Div. 588.....	147
Matrever's Case, 30 Ass. pl. 38.....	156	†Murdock v. Railroad Co., 137 Mass. 293.....	80
Matthew v. Ollerton, Comb. 218.....	74	†Murphy v. Deane, 101 Mass. 455.....	225
Matthews v. Beach, 5 Sandf. 256.....	126	Murphy v. Martin, 58 Wis. 279, 16 N. W. Rep. 603.....	90
May v. Burdett, 92 Q. B. 101, 9 Adol. & E. (N. S.) 101.....	192-194	†Murphy v. Moore, (Pa.) 11 Atl. Rep. 665.....	104
Mayer v. Walter, 64 Pa. St. 283.....	105	Murphy v. Railroad Co., 30 Conn. 184, 29 Conn. 496.....	266
†Maynard v. Maynard, 49 Vt. 297.....	260	Murphy v. Walters, 34 Mich. 180.....	89
Mayor of Lynn v. Mayor of London, 4 Term R. 130, 141, 143, 144.....	19	Murray v. Railroad Co., 93 N. C. 92.....	227
Mayrant v. Richardson, 1 Nott & McC. 347.....	125	Myers v. Gemmel, 10 Barb. 537.....	4
†Mayse v. Cocksedge, Willes, 637.....	156	Myers v. Malcolm, 6 Hill, 292.....	179
Meade's Case, Lewin, 185.....	76	†Narehood v. Wilhelm, 69 Pa. St. 64.....	157
†Meirhof Bros. Brick Manuf'g Co. v. Railroad Co., 51 N. J. Law, 56, 16 Atl. Rep. 12.....	185	Neal v. Lewis, 2 Bay, 204.....	113
Meigs v. Lister, 23 N. J. Eq. 200.....	167	Nebenzahl v. Townsend, 10 Daly, 236.....	90
Melan v. Duke of Fitzjames, 1 Bos. & P. 138.....	237	Needham v. Railway Co., 38 Vt. 295.....	267
Mellor v. Spateman, 1 Saund. 346r, note 2.....	20	†Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. Rep. 546.....	236
McIlvay v. Brown, 15 Mass. 82.....	232		

	Page		Page
Nettleton v. Sikes, 8 Metc. (Mass.) 34.....	159	†Pennsylvania Coal Co. v. Sanderson, 112 Pa. St. 126, 6 Atl. Rep. 453.....	28
Newark Coal Co. v. Upson, 40 Ohio St. 17.....	106	Pennsylvania Co. v. Hope, 80 Pa. St. 373.....	43
Newburgh & C. Turnpike Road v. Miller, 5 Johns. Ch. 101.....	21	†Pennsylvania Co. v. Roney, 89 Ind. 453.....	237
Newcastle, Duke of, v. Clark, 8 Taunt. 602.....	212	†Pennsylvania R. Co. v. Coon, 111 Pa. St. 430, 3 Atl. Rep. 234.....	220
†New Jersey Steam-Boat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. Rep. 1039.....	80	Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353.....	40, 41, 43
Newkirk v. Sabler, 9 Barb. 632.....	160	Penrose v. Curren, 3 Rawle, 351.....	230
Newman v. Zachary, Ayleyn, 3.....	45	Penruddock's Case, 5 Coke, 100b, 101a.....	183, 190
†New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649.....	242	People v. Crosswell, 3 Johns. Cas. 336, 354.....	127, 133, 134
†New York v. Lord, 13 Wend. 126.....	159	†People v. Dann, 53 Mich. 490, 19 N. W. Rep. 159.....	77
†New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. Law, 161.....	236	People v. Goff, 52 N. Y. 434.....	267
†Nichols v. Nowling, 82 Ind. 483.....	69	†People v. Lead-Works, 82 Mich. 471, 46 N. W. Rep. 735.....	170
Nicholson v. Coghill, 4 Barn. & C. 21, 6 Dowl. & R. 12.....	103	People v. Lilley, 43 Mich. 521, 525, 5 N. W. Rep. 982.....	70, 71
†Nicholson v. Railroad Co., 41 N. Y. 525.....	230	People v. Mayor, etc., 2 Hill, 9, 11.....	212
Nickleson v. Stryker, 10 Johns. 115.....	218	People v. Sands, 1 Johns. 78.....	179
†Niles v. Howe, 57 Vt. 383.....	267	People v. Supervisors, 1 Hill, 195; 15 Wend. 198.....	212
†Nitro-Glycerine Case, 15 Wall. 524.....	53	People v. Williams, 4 Hill, 9.....	265
Niven v. Munn, 13 Johns. 48.....	112	Peoria Marine & Fire Ins. Co. v. Frost, 37 Ill. 333.....	247
Noonan v. City of Albany, 79 N. Y. 475.....	172	Percival v. Hickey, 13 Johns. 257, 285.....	50, 151
†Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590.....	244	Perkins v. Mitchell, 31 Barb. 465.....	127
Northern R. Co. v. Page, 22 Barb. 130.....	86	†Perkins v. Mossman, 44 N. J. Law, 579.....	194
Nowel v. Smith, Cro. Eliz. 709.....	163	Perkins v. Smith, 1 Wils. 328.....	205
†Noyes v. Boscawen, 64 N. H. 361, 10 Atl. Rep. 690.....	236	Perley v. Railroad Co., 98 Mass. 414.....	43
†O'Brien v. McGlinchy, 68 Me. 552.....	233	Perry v. Man, 1 R. I. 263.....	136
O'Callaghan v. Cronan, 121 Mass. 114.....	60	†Perry v. Porter, 124 Mass. 338.....	136
†Ogborn v. Francis, 44 N. J. Law, 441.....	219	Peterson v. Haffner, 26 Amer. Rep. 81.....	70
Ogburn v. Connor, 46 Cal. 346.....	171	Pettigrew v. Evansville, 25 Wis. 223.....	171
Olmsted v. Brown, 12 Barb. 657.....	122, 124	Phelps v. Nowlen, 72 N. Y. 39.....	172
Olmsted v. Miller, 1 Wend. 506.....	122	†Philadelphia City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367.....	228
O'Neill v. James, 43 N. Y. 84-93.....	192	†Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. Rep. 105.....	236
Onslow v. Horne, 3 Wils. 177, 188, 117, 119, 120, 126.....	60	†Philadelphia & R. R. Co. v. Derby, 14 How. 403.....	239
Orange Bank v. Brown, 3 Wend. 161, 162.....	156	†Philadelphia & R. R. Co. v. Hummell, 44 Pa. St. 375, 378.....	6, 7
†Orme v. Smith, Gilb. Ch. 82.....	156	Phillips v. Biggs, Hardr. 164.....	69
Ormsby v. Douglass, 37 N. Y. 477.....	143	Phillips v. Hall, 8 Wend. 610.....	196
Osborne v. Sture, 3 Salf. 182.....	160	Phillips v. Jansen, 2 Esp. 624.....	131
†Overton v. Freeman, 1 C. B. 867.....	242	Phythian v. White, 1 Mees. & W. 216.....	154
Packard v. Getman, 4 Wend. 613.....	204	Pickard v. Collins, 23 Barb. 444.....	179
Padgett v. Sweeting, 65 Md. 404, 4 Atl. Rep. 887.....	138	†Pickering v. James, L. R. 8 C. P. 439.....	18
Page v. Bent, 2 Metc. (Mass.) 371.....	258	Pierce v. Street, 3 Barn. & Adol. 397.....	108
Page v. Cushing, 83 Me. 523.....	99, 108	Pierston v. Glean, 1 N. J. Law, 37.....	183
Page v. Olcott, 13 N. H. 399.....	163	Pigott & Shewry's Case, W. Jones, 145; Palm. 444; Latch, 153; Noy, 84; 3 Bulst. 339; Poph. 166.....	26
Palmer v. Fleshees, Sid. 167.....	26	†Pike v. Megoun, 44 Mo. 491.....	212
Palmer v. Jarmain, 2 Mees. & W. 232.....	193	Pilkington's Case, 5 Coke, 76a.....	156, 157
Pangburn v. Bull, 1 Wend. 345.....	105	†Pillow v. Bushnell, 5 Barb. 156.....	75
Panton v. Holland, 17 Johns. 92.....	229	Pindar v. Wadsworth, 2 East, 162.....	21
†Panton v. People, 114 Ill. 505, 2 N. E. Rep. 411.....	77	†Piper v. Pearson, 2 Gray, 120.....	212
Parker v. Farley, 10 Cush. 279.....	102	†Pittard v. Oliver, 1 Q. B. 474.....	132
Parker v. Foote, 19 Wend. 309.....	2, 4	Pitts v. Lancaster Mills, 13 Metc. (Mass.) 156.....	174
Parker v. Huntington, 2 Gray, 124.....	14, 110	†Pittsburgh & L. E. R. Co. v. Jones, 111 Pa. St. 204, 2 Atl. Rep. 410.....	185
Parker v. Langley, Gilb. Cas. 163.....	105	Pixley v. Clark, 35 N. Y. 523.....	179
Parker v. Mise, 27 Ala. 480.....	194	Pleasants v. Fant, 22 Wall. 121.....	225
Parker v. Mitchell, 11 Adol. & E. 788.....	167	Plumer v. Robertson, 6 Serg. & R. 177.....	219
Parker v. Walrod, 13 Wend. 206.....	196	Plummer v. Webb, 1 Ware, 79.....	247
Parker v. Woollen Co., 2 Black, 545, 551.....	166	Poe v. Mondford, Cro. Eliz. 620.....	120
Parks v. Newburyport, 10 Gray, 28.....	171	Pointer v. Gill, 2 Rolle, Abr. 140.....	166
Parmiter v. Coupland, 6 Mees. & W. 105.....	125	Polhill v. Walter, 3 Barn. & Adol. 114.....	252, 254
Pasley v. Freeman, 2 Smith, Lead. Cas. 94, 3 Term R. 51, 61, 63.....	9, 31, 130, 251-253, 255	Polkinhorn v. Wright, 8 Q. B. (N. S.) 197.....	73
Pater v. Baker, 3 Man. G. & S. 868.....	149	†Pollard v. Lyon, 91 U. S. 225.....	115, 124
Patrick v. Colerick, 3 Mees. & W. 483.....	158	Pollett v. Long, 56 N. Y. 200.....	40, 41
†Paterson v. Nutter, 78 Me. 509, 7 Atl. Rep. 273.....	81	Pollitt v. Long, 58 Barb. 20.....	166
†Paterson v. Wilkinson, 55 Me. 42.....	149	Pollock v. Hastings, 88 Ind. 248.....	115
Pattinson v. Jones, 3 Barn. & C. 555.....	138	Pollock v. Lester, 11 Hare, 266.....	165
†Paul v. Hadley, 23 Barb. 521.....	260	Pomfret v. Ricroft, 1 Saund. 321, 323, note 3.....	151, 160
†Paul v. Summerhayes, 4 Q. B. Div. 9.....	153	†Pope v. Boyle, 98 Mo. 527, 11 S. W. Rep. 1010.....	183
Payne v. Donegan, 9 Ill. App. 566.....	105	†Post v. Stockwell, 34 Hun, 373.....	68
Payne v. Partridge, 1 Salk. 12.....	107	Potts v. Inlay, 4 N. J. Law, 330.....	105
Pearson v. Skelton, 1 Mees. & W. 504.....	69	Poult v. Slocum, 3 Blackf. 421.....	10
†Pease v. Railroad Co., 101 N. Y. 367, 5 N. E. Rep. 37.....	80	Powers v. Russell, 13 Pick. 69, 76.....	53
†Pease v. Smith, 61 N. Y. 477.....	201, 206	Poynton v. Forster, 3 Camp. 61, note b.....	107
Peck v. Elder, 3 Sandf. 129.....	166	Pozzi v. Shipton, 8 Adol. & E. 963.....	56
†Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. Rep. 350.....	172	†Pratt v. Gardner, 2 Cush. 68.....	208
†Peck v. Herrington, 109 Ill. 611.....	172		
Peck v. Gurney, L. R. 6 H. L. 377, 409.....	254		
Pennsylvania v. Bridge Co., 18 How. 421.....	189		

	Page		Page
Presbrey v. Railway, 103 Mass. 1, 6, 7.....	187	†Roberts v. Young, 1 Brown & G. 173.....	156
President, etc., of the Baltimore & Y. Turnpike		Robinson v. Burleigh, 5 N. H. 225.....	205
Road v. Boone, 45 Md. 344.....	56	Robinson v. Chamberlain, 34 N. Y. 389.....	213
†Price v. Seeley, 10 Clark & F. 23.....	98	†Robinson v. Cone, 22 Vt. 214.....	233
†Prideaux v. Bunnett, 1 C. B. (N. S.) 613.....	262	†Robinson v. Railroad Co., 66 N. Y. 11.....	236
†Pridham v. Tucker, Yel. 153.....	117	Robinson v. State, 31 Tex. 170.....	71
†Priestley v. Fowler, 3 Mees. & W. 1.....	63	†Robinson v. Waller, 1 Rolle, 449.....	156
†Proctor v. Webster, 16 Q. B. Div. 112.....	145	†Robinson v. Walter, 3 Bulst. 269, 270.....	156
†Proprietors of the Wyrley & Essington Canal		†Rockford, R. I. & S. L. R. Co. v. Delaney, 82	
Navigation v. Bradley, 7 East, 368.....	25	Ill. 198.....	223
†Pursell v. Stover, 110 Pa. St. 43, 20 Atl. Rep.		Rockingham Mut. Fire Ins. Co. v. Bosher, 39	
403.....	159	Me. 253.....	248
Putnam v. Payne, 13 Johns. 312.....	192	Roderigas v. Institution, 63 N. Y. 460.....	267
Putnam v. Railroad Co., 55 N. Y. 108.....	40	Rogers v. Clifton, 3 Bos. & P. 537.....	138
Putnam v. Wyley, 8 Johns. 337.....	196	†Rogers v. Manufacturing Co., 144 Mass. 198,	
Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276,		11 N. E. Rep. 77.....	244
283.....	184	Rogers v. Spence, 13 Mees. & W. 571, 581.....	78
†Quinn v. Power, 87 N. Y. 535.....	230	Root v. King, 7 Cow. 613.....	136
†Radcliff v. Mayor, etc., of Brooklyn, 4 N. Y.		Ross v. Butler, 19 N. J. Eq. 294.....	167
195.....	28	Ross v. Johnson, 5 Burrows, 2825.....	200
Radenhurst v. Coate, 6 Grant, Ch. 140.....	167	Ross v. Norman, 5 Exch. 359.....	103
†Radley v. Railroad Co., L. R. 1 App. Cas. 754		†Rosse v. Bramsteed, 2 Rolle, 438.....	156
226		Roswell v. Prior, 12 Mod. 635.....	183
Railroad Co. v. Gladmon, 15 Wall. 401.....	227	Rounds v. Railroad Co., 64 N. Y. 129.....	88
†Railroad Co. v. McDonnell, 43 Md. 534.....	238	Roussin v. Benton, 6 Mo. 592.....	154
†Railroad Co. v. Skillman, 39 Ohio St. 444.....	80	†Roy v. Goings, 112 Ill. 656.....	102
Railroad Co. v. Stout, 17 Wall. 657.....	226	†Royce v. Maloney, 57 Vt. 325.....	136
†Ramsey v. Wallace, 100 N. C. 75, 6 S. E. Rep.		Ruckley v. Kiernan, 7 Ir. C. L. 75.....	138
633.....	258	Ruggles v. Lesure, 24 Pick. 190.....	159
Randall v. Brigham, 7 Wall. 523.....	203	†Rundell v. Kalbfus, 125 Pa. St. 123, 17 Atl.	
Randall v. Cleaveland, 6 Conn. 323.....	154	Rep. 238.....	110
Randall v. Hazelton, 12 Allen, 412.....	11, 60	Runkle v. Meyer, 3 Yeates, 518.....	125
†Randlette v. Judkins, 77 Me. 114.....	15	Russell v. Richards, 10 Me. 429, 11 Me. 371.....	158
†Rankin v. Ekel, 64 Cal. 446, 1 Pac. Rep. 895..	215	Russell v. Shuster, 8 Watts & S. 309.....	97
†Rapson v. Cubitt, 9 Mees. & W. 710.....	63	Rust v. Low, 6 Mass. 94, 99, 100.....	163
Rathbun v. Payne, 19 Wend. 399.....	229, 230	Ruter v. Foy, 46 Iowa, 132.....	75
†Rathke v. Gardner, 134 Mass. 14.....	172	Rutherford v. Holmes, 65 N. Y. 370.....	92
Ravenga v. Mackintosh, 2 Barn. & C. 693.....	101	Ryan v. Railroad Co., 36 N. Y. 210.....	40, 41, 43
Rawstron v. Taylor, 11 Exch. 369.....	172	Ryppon v. Bowles, Cro. Jac. 373.....	183
Ray v. Law, Pet. C. C. 207.....	105	†St. Clair St. Ry. Co. v. Eadie, 43 Ohio St. 91,	
Rayne v. Taylor, 14 La. Ann. 406.....	136	1 N. E. Rep. 519.....	236
†Raynsford v. Phelps, 43 Mich. 342, 5 N. W.		St. Helen's Smelting Co. v. Tipping, 11 H. L.	
Rep. 403.....	214	Cas. 642, 35 Law J. Q. B. 66.....	30, 177
Reese River Silver Min. Co. v. Smith, L. R. 4		†St. Joseph Fire & Marine Ins. Co. v. Leland,	
H. L. 64, 79.....	254	90 Mo. 177, 2 S. W. Rep. 431.....	214
Reg. v. Boden, 1 Car. & K. 395, 397.....	79	Salem India Rubber Co. v. Adams, 23 Pick.	
Reg. v. Callingwood, 2 Ld. Raym. 1116.....	46	256.....	265
Reg. v. Cohen, 2 Denison, Cr. Cas. 249.....	78	†Salisbury v. Howe, 87 N. Y. 128.....	257
Reg. v. Haines, 2 Car. & K. 368, 371.....	66	Salkwell v. Milwarde, 26 Hen. VI. c. 23.....	163
Reg. v. Hemmings, 4 Fost. & F. 50.....	79	Salt Springs Nat. Bank v. Wheeler, 48 N. Y.	
Reg. v. James, 1 Car. & K. 530.....	71	492.....	200, 201
Reg. v. Mabel, 9 Car. & P. 474.....	96	Salvin v. Coal Co., L. R. 9 Ch. App. 705.....	164
Reg. v. Rodway, 9 Car. & P. 784.....	78	Sampson v. Henry, 13 Pick. 36.....	76
Reg. v. St. George, 9 Car. & P. 483.....	71	Sampson v. Smith, 8 Sim. 272.....	166
Reg. v. Slowly, 12 Cox, Crim. Cas. 269.....	78	Samuel v. Payne, Doug. 359.....	94
Reg. v. Swindall, 2 Car. & K. 232, 233.....	66	Sanderson v. Caldwell, 45 N. Y. 405.....	127
Reg. v. Thompson, Leigh & C. 225.....	78	†Sandford v. Clarke, 21 Q. B. Div. 898.....	183
Reid v. Gifford, Hopk. Ch. 416.....	166	Sanford v. Railroad Co., 23 N. Y. 843.....	80, 239
Revis v. Smith, 18 C. B. 126.....	14	Sarjeant v. Blunt, 16 Johns. 73.....	198
Rex v. Creevey, 1 Maule & S. 273.....	145	Saunders v. Newman, 1 Barn. & Ald. 258.....	22
Rex v. Cross, 2 Car. & P. 483.....	138	†Savacool v. Boughton, 5 Wend. 170.....	216
Rex v. Harvey, 2 Barn. & C. 257.....	127	Savage v. Brewer, 16 Pick. 453.....	103
Rex v. Huggins, 2 Ld. Raym. 1583.....	137	Savil v. Roberts, 1 Salk. 14.....	105
Rex v. Milton, Moody & M. 107.....	78	Savile v. Jardine, 2 H. Bl. 532.....	113
Rex v. Pease, 4 Barn. & Adol. 30.....	187	Savill v. Roberts, 12 Mod. 208.....	107
Rex v. White, 1 Burrows, 337.....	25, 166,	Sayles v. Briggs, 4 Metc. (Mass.) 421, 426.....	103
Rex v. Williams, 6 Car. & P. 390.....	79	Scheer v. Keown, 29 Wis. 536.....	90
Reynolds v. Shuler, 5 Cow. 325.....	196	†Scheffer v. Railroad Co., 105 U. S. 249.....	48
Rice v. Coolidge, 121 Mass. 393.....	146,	Schroyer v. Lynch, 8 Watts, 453.....	214
Rice v. Manley, 66 N. Y. 83.....	67	Scott v. Dock Co., 3 Hurl. & C. 596.....	222
Richardson v. Railroad Co., 98 Mass. 85.....	267	†Scott v. Grover, 56 Vt. 499.....	163
Richardson v. Smith, 1 Camp. 277.....	31	Scott v. Rogers, 31 N. Y. 676.....	198
†Riddle v. McGinnis, 22 W. Va. 253.....	219	Scott v. Shepherd, 3 Wils. 403, 2 W. Bl. 892..	
Rider v. White, 65 N. Y. 54.....	192	33, 36, 37, 40, 43, 50	
Riding v. Smith, 1 Exch. Div. 91.....	110	Seaman v. Cuppledick, Owen, 150.....	76, 78
Rigaut v. Gallisard, 7 Mod. 73, 2 Ld. Raym. 809,		Seaman v. Netherclift, 1 C. P. Div. 540.....	14
Holt, 50.....	217	Seddon v. Connell, 10 Sim. 81.....	69
†Rindge v. Sargent, 64 N. H. 294, 9 Atl. Rep.		Seibert v. Price, 5 Watts & S. 438.....	100
723.....	172	Selfridge, Trial of, 160.....	77
Ring v. Wheeler, 7 Cow. 725.....	146	Selma, R. & D. R. Co. v. Lacy, 43 Ga. 461.....	267
Ripley v. Severance, 6 Pick. 474.....	10	†Semayne's Case, 5 Coke, 91a.....	215
Risney v. Selby, 1 Salk. 211.....	251	Seneca Road Co. v. Auburn & R. R. Co., 5	
Roath v. Driscoll, 20 Conn. 533.....	27	Hill, 170.....	38
Roberts v. Clarke, 18 Law T. (N. S.) 49.....	165,	Severy v. Nickerson, 120 Mass. 306.....	220
†Roberts v. Herbert, 1 Sid. 5.....	156	†Shafer v. Ahalt, 48 Md. 171.....	124
†Roberts v. Rose, 4 Hurl. & C. 103.....	191	†Shapcott v. Mugford, 1 Ld. Raym. 188.....	156

	Page		Page
Sharp v. Powell, L. R. 7 C. P. 253.....	35	State v. Davis, 35 Amer. Dec. 735, 1 Ired. 125, 127.....	70-72
†Shaw v. Kaler, 106 Mass. 448.....	202	State v. Elliot, 11 N. H. 540.....	78
Shay v. Thompson, 59 Wis. 540, 18 N. W. Rep. 473.....	74, 75	†State v. Godfrey, 17 Or. 300, 20 Pac. Rep. 625.....	71
Sheldon v. Hill, 33 Mich. 171.....	90	†State v. Goid, 53 Me. 279.....	80
Shelton v. Nance, 7 B. Mon. 123.....	125	†State v. Greer, 22 W. Va. 800.....	77
Sheridan v. New Quay Co., 4 C. B. (N. S.) 618.....	205	†State v. Hampton, 63 N. C. 13.....	72
Sherwood v. Salmon, 5 Day, 439, 449.....	264	State v. Hollyway, 41 Iowa, 200.....	79
Shields v. Yonge, 15 Ga. 349.....	247	†State v. Jones, 95 N. C. 588.....	81
Shingleton v. Smith, Lutw. 1481, 1483.....	78	†State v. Koonz, 53 Mo. 323.....	215
Shipley v. Todhunter, 7 Car. & P. 680.....	125	†State v. Middleham, 62 Iowa, 150, 17 N. W. Rep. 446.....	77
Shipp v. McCraw, 3 Murph. 463.....	267	State v. Moore, 31 Conn. 479.....	8
†Shippy v. Au Sable, (Mich.) 48 N. W. Rep. 554.....	233	State v. Mullikin, 8 Blackf. 260.....	158
†Shorter v. People, 2 N. Y. 193.....	77	State v. Nash, 88 N. C. 618.....	79
Shury v. Piggot, 3 Bulst. 339, Poph. 166.....	22	State v. Neely, 74 N. C. 425.....	71
†Silver Spring Bleaching & Dyeing Co. v. Wanskuck, 13 R. I. 611.....	176	†State v. Peacock, 40 Ohio St. 333.....	77
Simar v. Canaday, 53 N. Y. 306.....	262	State v. Pendergrass, 2 Dev. & B. 365.....	81
†Simmons v. Mitchell, L. R. 6 App. Cas. 156.....	115	†State v. Railroad Co., 80 Me. 430, 15 Atl. Rep. 36.....	236
Simpson v. Hornbeck, 3 Lans. 53.....	91	State v. Railroad Co., 45 Md. 41.....	267
Slaughter's Adm'r v. Gerson, 13 Wall. 353.....	265	†State v. Railroad, 52 N. H. 528.....	226
Slingsby v. Barnard, 1 Rolle, 430.....	25	†State v. Sears, 56 Mo. 169.....	71
Smith v. Benson, 1 Hill, 176.....	158	State v. Shepard, 10 Iowa, 126.....	71
Smith v. Boston, 7 Cush. 254.....	184	State v. Smith, 2 Humph. 457.....	71
Smith v. Bull, 17 Wend. 323.....	266	†Steele v. Dunham, 26 Wis. 393.....	212
Smith v. Chadwick, L. R. 9 App. Cas. 187, 190, 193, 20 Ch. Div. 27, 44, 67.....	250, 254, 255, 257	Steele v. Southwick, 9 Johns. 214, 1 Amer. Lead. Cas. 135.....	127
Smith v. Countryman, 30 N. Y. 681.....	264	Steinmetz v. Kelly, 72 Ind. 442.....	75
Smith v. Howard, 28 Iowa, 51.....	14	Stephens v. Elwall, 4 Maule & S. 259.....	205
Smith v. Lewis, 3 Johns. 157.....	13, 14	Stephenson v. Hart, 4 King. 476.....	204
Smith v. London, etc., Docks Co., L. R. 3 C. P. 326.....	220	Stetson v. Faxon, 19 Pick. 147.....	184
Smith v. Pelah, 2 Strange, 1264.....	192, 193	Steuer v. State, 59 Wis. 472, 18 N. W. Rep. 433.....	89
Smith v. Richardson, Willes, 24.....	129	Stevens v. Fassett, 27 Me. 280.....	81
Smith v. Shaw, 12 Johns. 257.....	90	Stevens v. Hartwell, 11 Metc. (Mass.) 542.....	122
Smith v. Smith, 56 How. Pr. 316.....	105	Stevenson v. Hayden, 2 Mass. 406.....	113
Smith v. Spooner, 3 Taunt. 254.....	149	†Steward v. Gromett, 7 C. B. (N. S.) 191.....	107
Smith v. State, 12 Ohio St. 466.....	74	Stewart v. Hawley, 21 Wend. 552.....	89
Smith v. Taylor, 1 Bos. & P. (N. R.) 196.....	120	†Stewart v. Rancho Co., 123 U. S. 383, 9 Sup. Ct. Rep. 101.....	260
Smith v. Tonstall, Carth. 3.....	8, 10, 11	†Stewart v. Sonneborn, 93 U. S. 157.....	101
†Smith v. Walter, 125 Pa. St. 453, 17 Atl. Rep. 463.....	102	†Stitzell v. Reynolds, 59 Pa. St. 438.....	149
†Snag v. Gee, 4 Coke, 16a.....	115	Stockton v. Frey, 4 Gill, 406.....	56
Snell v. Snow, 13 Metc. (Mass.) 278.....	148	Stokes v. Saltonstall, 13 Pet. 181.....	56
Snyder v. Andrews, 6 Barb. 43.....	126	†Stone v. Cartwright, 6 Term R. 411.....	25
†Sohn v. Cambern, 106 Ind. 302, 6 N. E. Rep. 813.....	185	Stone v. Cooper, 2 Denio, 293, 294.....	125, 128
†Solinsky v. Bank, 85 Tenn. 365, 4 S. W. Rep. 836.....	215	Stone v. Denny, 4 Metc. (Mass.) 151.....	258
Solomons v. Dawes, 1 Esp. 83.....	205	†Stone v. Hills, 45 Conn. 44.....	239
Soltau v. De Held, 2 Sim. (N. S.) 133, 177, 178, 185.....	135	Stone v. Hooker, 9 Cow. 154.....	69
Somerville v. Hawkins, 10 C. B. 533.....	101	†Stone v. Railroad Co., 115 N. Y. 104, 21 N. E. Rep. 712.....	298
Sommer v. Wilt, 4 Serg. & R. 24.....	101	Storey v. Challands, 8 Car. & P. 234.....	140
†Sorenson v. Dundas, 50 Wis. 335, 7 N. W. Rep. 259.....	86	Stout v. Wood, 1 Blackf. 71.....	267
Soule v. Railroad Co., 24 Conn. 575.....	266	Stout v. Wren, 1 Hawks, 420.....	74
†Souter v. Codman, 14 R. I. 119.....	77	Stow v. Converse, 3 Conn. 325.....	125
Southam v. Allen, 3 Salk. 326.....	119	Stowball v. Ansell, Comb. 116.....	212
South Carolina v. Georgia, 93 U. S. 4, 12.....	189	Stowel v. Zouch, Plow. 364.....	230
†Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. Rep. 881.....	262	†Stowell v. Otis, 71 N. Y. 36.....	202
Southold v. Daunston, Cro. Car. 269.....	45	†Striegel v. Moore, 55 Iowa, 88, 7 N. W. Rep. 413.....	50
†Spafts v. Poundstone, 87 Ind. 522.....	132	†Stringham v. Hilton, 111 N. Y. 188, 18 N. E. Rep. 870.....	244
Sparhawk v. Railway Co., 54 Pa. St. 401.....	177	Struthers v. Railway, 87 Pa. St. 282.....	187
Spencer v. Blackman, 9 Wend. 167.....	197, 198	†Studer v. Bleistein, 115 N. Y. 316, 22 N. E. Rep. 243.....	265
Spencer v. McGowen, 13 Wend. 256.....	76	†Sturtevant v. Root, 27 N. H. 69.....	149
Spencer v. Railway Co., 8 Sim. 193.....	185	†Sullivan v. Railroad Co., 148 Mass. 119, 18 N. E. Rep. 678.....	80
Spofford v. Harlow, 3 Allen, 176.....	8	Sumner v. Utley, 7 Conn. 257.....	120
Spooner v. Manchester, 133 Mass. 270.....	200, 201	Sunbolf v. Alford, 3 Mees. & W. 248.....	87
†Spooner v. Railroad Co., 115 N. Y. 22, 21 N. E. Rep. 696.....	237	Sutton v. Buck, 2 Taunt. 302, 312.....	159
Sprague v. Kneeland, 12 Wend. 161.....	68	Sutton v. Johnstone, 1 Term R. 493, 350.....	107
Spring Co. v. Edgar, 99 U. S. 645.....	194	Swaim v. Stafford, 3 Ired. 289, 4 Ired. 392.....	100
†Sproul v. Pillsbury, 72 Me. 20.....	132	Swans, Case of, 7 Coke, 18.....	194
Stackpole v. Healy, 16 Mass. 38.....	163	†Sweeny v. Railroad Co., 10 Allen, 368.....	220
Standish v. Steam-Ship Co., 111 Mass. 512.....	87	Sweetapple v. Jesse, 5 Barn. & Adol. 27.....	149
†Stanley v. Gaylord, 1 Cush. 536.....	196	Sweet v. Cutts, 50 N. H. 439.....	171
†Stanley v. Powell, [1891,] 1 Q. B. Div. 86.....	53	Syeds v. Hay, 4 Term R. 260.....	198
†Staples v. Smith, 48 Me. 470.....	197	†Symonds v. Hall, 37 Me. 354.....	215
Starling v. Turner, 2 Lev. 50, 2 Vent. 25.....	20	Taaffe v. Townes, 3 Moore, P. C. 41, note.....	267
Starr v. Bennett, 5 Hill, 303.....	264	Taggart v. Commonwealth, 21 Pa. St. 527.....	190
Starr v. Jackson, 11 Mass. 519.....	155	Tallman v. Green, 3 Sandf. 437.....	264
State v. Benedict, 11 Vt. 238.....	71	Tapley v. Wainwright, 5 Barn. & Adol. 395.....	154
State v. Blackwell, 9 Ala. 79.....	70	Taplin's Case, 2 East, P. C. 712.....	71
State v. Brown, 5 Har. (Del.) 507.....	97	Tapp v. Lee, 3 Bos. & P. 367.....	31
		Tarver v. State, 43 Ala. 354.....	70
		Taylor v. Ashton, 11 Mees. & W. 401.....	252, 255

	Page		Page
Taylor v. Church, 8 N. Y. 452.....	143, 144	Venafr v. Johnson, 10 Bing. 301; 3 Moore & S. 347; 6 Car. & P. 50.....	103
†Taylor v. Guest, 53 N. Y. 262.....	32	Vernon v. Keys, 12 East, 632, 4 Taunt. 488.....	11, 264
Taylor v. Markham, Cro. Jac. 224; Yelv. 157; 1 Brown & G. 215.....	78	†Verplanck v. Van Buren, 76 N. Y. 259.....	110
Taylor v. People, 6 Parker, Crim. R. 352.....	166, 167	Vicars v. Wilcocks, 8 East, 1, 2 Smith, Lead. Cas. (8th Ed.) 554.....	44, 48, 122, 123, 150
Taylor v. Seymour, 6 Cal. 512.....	215	Village of Delhi v. Youmans, 45 N. Y. 362.....	27
†Taylor v. Strong, 3 Wend. 384.....	98	†Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. Rep. 197.....	189
Taylor v. Whitehead, 2 Doug. 745, 747.....	151, 160	Villers v. Monsley, 2 Wils. 403.....	125
Taylor v. Wilson, 1 N. J. Law, 362.....	105	†Vinal v. Core, 15 W. Va. 1.....	101
†Teall v. Felton, 1 N. Y. 557.....	214	Vincent v. Stinehour, 7 Vt. 62.....	52
Tebbetts v. Goding, 9 Gray, 254.....	149	†Vining v. Baker, 53 Me. 544.....	212
Tenant v. Golding, 1 Salk. 21.....	222	Von Latham v. Libby, 38 Barb. 345.....	89
Tessymond's Case, 1 Lewin, Cr. Cas. 169.....	66	Von Latham v. Rowan, 17 Abb. Pr. 238, 248.....	98
Tewksbury v. Bucklin, 7 N. H. 518.....	163	Vrooman v. Lawyer, 13 Johns. 389.....	153
Thayer v. Arnold, 4 Metc. (Mass.) 589.....	163		
Thayer v. Boston, 19 Pick. 511, 514.....	184	†Wahl v. Walton, 30 Minn. 506, 16 N. W. Rep. 397.....	98
†Thomas v. Blasdale, 147 Mass. 433, 18 N. E. Rep. 214.....	115	Waite v. Railway Co., El. & Bl. & El. 719.....	235
Thomas v. Rouse, 2 Brev. 75.....	105	Wakeman v. Robinson, 1 Bing. 213.....	52
Thomas v. Winchester, 6 N. Y. 397.....	40	Walden v. Mitchell, 2 Vent. 265, 266.....	117
Thompson v. Bond, 1 Camp. 4.....	31	†Wales v. Miner, 89 Ind. 118.....	217
Thorley v. Kerry, 4 Taunt. 355.....	125	†Walker v. Cronin, 107 Mass. 555.....	47
Thorogood v. Bryan, 8 C. B. 115.....	233-236	Walker v. Milner, 4 Fost. & F. 745.....	261
†Thorp v. Burling, 11 Johns. 285.....	37	Walker v. Railway, 103 Mass. 10-14.....	187
†Thorp v. Thorp, 12 Mod. 461.....	156	Wall v. Hoskins, 5 Ired. 177.....	267
†Thurber v. Railroad Co., 60 N. Y. 326.....	228	Waller v. Railway Co., 32 Law J. Exch. 205.....	246
†Thurston v. Adams, 41 Me. 419.....	216	Walster v. Seife, 4 Eng. Law & Eq. 18, 4 De Gex & S. 323.....	165, 177
Timothy v. Simpson, 1 Crompt. & M. & R. 757.....	96	†Walton v. Car Co., 139 Mass. 556, 2 N. E. Rep. 101.....	239
Tipping v. Smelting Co., 4 Best & S. 608-615, 11 H. L. Cas. 642.....	166, 168, 179, 185	Ward v. Center, 3 Johns. 271.....	31
Todd v. Hawkins, 8 Car. & P. 88.....	141, 143	Ward v. Conatser, 4 Baxt. 64.....	51
Todd v. Railroad Co., 3 Allen, 18, 7 Allen, 207.....	225	Ward v. Macauley, 4 Term R. 480, 489.....	196, 202
†Tollit v. Sherstone, 5 Mees. & W. 283.....	63	Ward v. Railroad Co., 11 Abb. Pr. (N. S.) 411.....	225
Tomkins v. Haile, 3 Wend. 406.....	204	Ward v. Weeks, 7 Bing. 211.....	122
Tomlinson v. Warner, 9 Ohio, 104.....	106	†Warren v. Perkins, Falm. 228.....	156
†Tonawanda R. Co. v. Munger, 5 Denio, 255-163, 220		Warren v. Warren, 1 Crompt. & M. & R. 250.....	147
Toogood v. Spyrring, 1 Crompt. & M. & R. 181-139, 144		Washburn v. Cooke, 3 Denio, 110, 112.....	143, 146
Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460.....	53	†Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044.....	244
Towne v. Wiley, 23 Vt. 355.....	201	†Watbroke v. Griffith, Moore, 877.....	156
Townsend v. Railroad Co., 56 N. Y. 295.....	87	Watkins v. Lee, 5 Mees. & W. 270.....	103
†Tracy v. Cloyd, 10 W. Va. 19.....	214	Watson v. Vanderlash, Het. 69.....	120
Tremain v. Cohoes Co., 2 N. Y. 163.....	179	Watson v. Watson, 9 Conn. 140.....	216
†Tryon v. Whitmarsh, 1 Metc. (Mass.) 1.....	32	Weatherston v. Hawkins, 1 Term R. 110.....	129, 137
†Tuberville v. Savage, 1 Mod. 3.....	72	Weaver v. Bush, 8 Term R. 78.....	76, 152
Tuff v. Warman, 5 C. B. (N. S.) 573.....	224	Weaver v. Ward, Hob. 134.....	51, 230
Tunbridge Dippers, Case of, 2 Wils. 414.....	20	Webb v. Railroad Co., 49 N. Y. 420.....	40, 43
†Tunstall v. Christian, 80 Va. 1.....	28	Webber v. Gage, 89 N. H. 182.....	166
Turner v. Meymott, 1 Bing. 158.....	152	Webber v. Gay, 24 Wend. 485.....	216
†Turpen v. Booth, 56 Cal. 65.....	212	Weir v. Bell, 3 Exch. Div. 238.....	254, 255
Tuson v. Evans, 12 Adol. & El. 733.....	147	Weller v. Baker, 2 Wils. 414.....	20
Tuthill v. Milton, Cro. Jac. 222.....	118	Wellington v. Small, 3 Cush. 145.....	14
†Tuttle v. Railway, 122 U. S. 189, 7 Sup. Ct. Rep. 1166.....	244	Wells v. Howell, 19 Johns. 385.....	163
Tutty v. Alewin, 11 Mod. 221.....	120	Wells v. Watling, 2 W. Bl. 1233.....	20
†Twigg v. Ryland, 62 Md. 380.....	194	†Welsh v. Bell, 32 Pa. St. 12.....	191
Tyler v. Wilkinson, 4 Mason, 397, 400-405.....	21, 22, 173	Wendell v. Railroad Co., 91 N. Y. 420.....	227
Type & Stereotype Foundry Co. v. Mortimer, 7 Pick. 166.....	10	†Wennhak v. Morgan, 20 Q. B. Div. 635.....	152
		Wesson v. Iron Co., 13 Allen, 95.....	177
†Underwood v. Robinson, 106 Mass. 296.....	216	West v. Smallwood, 8 Mees. & W. 418.....	59, 90
United States v. Coolidge, 1 Gall. 458, 1 Wheat. 415.....	117	Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. Rep. 490.....	177
United States v. Elder, 4 Cranch, C. C. 507.....	188	Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145, 162.....	253, 255
United States v. Hudson, 7 Cranch, 32.....	117	Wetmore v. Mellinger, 64 Iowa, 751, 18 N. W. Rep. 870.....	105
United States v. Worrall, 2 Dall. 384.....	117	Whaler v. Abl, 29 Pa. St. 98.....	175
Upton v. Vail, 2 Johns. 151, 6 Johns. 182.....	9, 262	Wheatley v. Baugh, 25 Pa. St. 528.....	27
		Wheeler v. Brant, 23 Barb. 324.....	192, 193
Van Bergen v. Van Bergen, 3 Johns. Ch. 282.....	21	†Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. Rep. 360.....	197
Vandenburgh v. Truax, 4 Denio, 464.....	40	†Wheeler v. Navigation Co., 125 N. Y. 155, 162, 26 N. E. Rep. 245.....	56
Vanderbilt v. Mathis, 5 Duer, 304.....	98, 101	†Wheeler v. Nesbitt, 24 How. 544.....	101
Vanderbilt v. Turnpike Co., 2 N. Y. 479.....	238	†Wheeler v. Wheeler, 33 Me. 347.....	203
Vanderwiele v. Taylor, 65 N. Y. 341.....	171	Wheeler v. Whiting, 9 Car. & P. 263.....	97
Vanduzer v. Linderman, 10 Johns. 106.....	98, 105	Wheeler and Appleton's Case, Godb. 340.....	131
Van Lien v. Manufacturing Co., 14 Abb. Pr. (N. S.) 74.....	224	Wheelock v. Wheelwright, 5 Mass. 103.....	198
Van Rensselaer v. Witbeck, 2 Lans. 499.....	168	Whipple v. Fuller, 11 Conn. 582.....	105
Van Tassel v. Capron, 1 Denio, 250.....	119	†White v. Carr, 71 Me. 555.....	102
†Van Vechten v. Hopkins, 5 Johns. 211.....	149	White v. Carroll, 42 N. Y. 161.....	14
†Van Winkle v. Boiler Co., 52 N. J. Law, 240, 19 Atl. Rep. 472.....	67	†White v. Nellis, 31 N. Y. 405.....	219
Van Wyck v. Aspinwall, 17 N. Y. 190.....	144	White v. Nicholls, 3 How. 266, 291.....	139, 145
Vasse v. Smith, 6 Cranch, 226.....	201	†White v. Phelps, 12 N. H. 382.....	203
Vaughan v. Menlove, 32 E. C. L. 219, 740.....	40	Whitehead v. Mathaway, 85 Ind. 55.....	75
Vaughan v. Railway, 5 Hurl. & N. 679, 685, 687.....	187		
Vaughn v. Congdon, 56 Vt. 111.....	90		
Vedder v. Fellows, 20 N. Y. 126.....	80, 87		

	Page		Page
Whiteley v. Adams, 15 C. B. (N. S.) 393.....	139	Wood v. Manley, 11 Adol. & E. 34.....	158
Whitfield v. Le De Spencer, Cowp. 754.....	214	Wood v. Sutcliffe, 2 Sim. (N. S.) 165.....	166
Whitford v. Railroad Co., 23 N. Y. 465.....	266	Wood v. Waud, 13 Jur. 472, 3 Exch. 748.....	176
Whitney v. Bartholomew, 21 Conn. 213.....	166	Woodard v. Dowsing, 2 Man. & R. 74.....	125
Whittaker v. Bradley, 7 Dowl. & R. 649.....	127	Woodard v. Railroad Co., 10 Ohio St. 121.....	267
Widrig v. Oyer, 13 Johns. 124.....	111	†Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E.	
Wier's Appeal, 74 Pa. St. 230.....	167, 170, 179, 180	Rep. 1050.....	267
†Wiggins v. Hathaway, 6 Barb. 632.....	214	Woodman v. Tufts, 9 N. H. 92.....	183
Wigglesworth v. Dallison, 1 Smith, Lead. Cas.		Woodmansie v. Logan, 2 N. J. Law, 63.....	105
963.....	267	Woods v. Finnell, 13 Bush, 623.....	105
†Wildee v. McKee, 111 Pa. St. 335, 2 Atl. Rep.		†Woods v. Wiman, 47 Hun, 362.....	144
108.....	110	Woodside v. Adams, 30 N. J. Law, 417.....	199
†Wilds v. Railroad Co., 24 N. Y. 430.....	225	†Woodworth v. Mills, 61 Wis. 44, 20 N. W. Rep.	
Willard v. Cambridge, 3 Allen, 574.....	184	728.....	164
Williams v. Hill, 19 Wend. 305.....	123	†Woodyear v. Schaefer, 57 Md. 384.....	176
†Williams v. Holdredge, 22 Barb. 396.....	116	Wooley v. Batte, 3 Car. & P. 417.....	69
Williams v. Morland, 2 Barn. & C. 910.....	20	Woolf v. Chalker, 31 Conn. 121, 127, 130.....	192-194
Williams v. Safford, 7 Barb. 309.....	160	†Woolsey v. Morris, 96 N. Y. 311.....	216
Williams v. Smith, 108 E. C. L. 596.....	92	†Wren v. Weild, L. R. 4 Q. B. 730.....	150
†Williams v. Spencer, 5 Johns. 352.....	215	Wright v. Howard, 1 Sim. & S. 190.....	21
Wills v. Noyes, 12 Pick. 324.....	99	†Wright v. Railroad Co., 25 N. Y. 562, 4 Allen,	
†Wilson v. Dubois, 35 Minn. 471, 29 N. W. Rep.		253.....	233, 247
68.....	15	Wright v. Ramscot, 1 Saund. 85.....	194
Wilson v. Mayor, etc., 1 Denio, 595, 598.....	212, 213	Wright v. Wilcox, 19 Wend. 343.....	238
†Wilson v. Merry, L. R. 1 H. L. 326.....	247	†Wykoff v. Stevenson, 46 N. J. Law, 326.....	206
Wilson v. Reed, 3 Johns. 175.....	203	†Wymore v. Mahaska Co., 78 Iowa, 396, 43 N.	
Wilton v. Webster, 7 Car. & P. 198.....	217	W. Rep. 264.....	233
Winchell v. Hicks, 18 N. Y. 558.....	192	Yates v. Joyce, 11 Johns. 136, 140.....	8-11
†Winn v. Abeles, 35 Kan. 85, 10 Pac. Rep. 443		Yates v. Lansing, 5 Johns. 282, 291, 9 Johns.	
23.....	23	396.....	207, 212
†Winnard v. Foster, Lutw. 1596.....	156	†Yeaton v. Railroad Corp., 135 Mass. 418.....	244
†Winship v. Neale, 10 Gray, 382.....	202	York v. Davis, 11 N. H. 241.....	163
Winsmore v. Greenbank, Willes, 577, 583.....	15, 183	York v. Johnson, 116 Mass. 482.....	140, 141
Winterbottom v. Wright, 10 Mees. & W. 109.....	66	Youl v. Harbottle, Peake, 49.....	204
Winterbourne v. Morgan, 11 East, 396, 402.....	151, 156	Young v. ———, 1 Ld. Raym. 725.....	151, 160
†Winters v. Railroad Co., 99 Mo. 509, 12 S. W.		†Young v. Clegg, 93 Ind. 371.....	132
Rep. 652.....	233	Young v. Macrae, 3 Best & S. 264, 32 Law J.	
Wintringham v. Lafoy, 7 Cow. 735.....	196	Q. B. 6.....	11-13
Wise v. Wilcox, 1 Day, 22.....	31	Young v. Spencer, 10 Barn. & C. 145.....	20
†Witte v. Hague, 2 Dowl. & R. 33.....	63	Yundt v. Hartrunft, 41 Ill. 9.....	217
†Wood v. Graves, 144 Mass. 365, 11 N. E. Rep.			
567.....	108		
†Wood v. Leadbitter, 13 Mees. & W. 838.....	159	†Zier v. Hoffin, 33 Minn. 66, 21 N. W. Rep. 862	128

LEADING CASES

UPON

THE LAW OF TORTS.

GENERAL PRINCIPLES.

No tort committed, unless a legal right or legal duty is violated.

(68 Ill. 478.)

GUEST *et al.* v. REYNOLDS.

(*Supreme Court of Illinois.* Sept. Term, 1873.)

ADJOINING LAND-OWNERS—OBSTRUCTION OF LIGHT AND AIR.

An owner of land who erects thereon a fence or wall which obstructs the access of light and air to a house on adjacent land, and also obstructs the view from such house, is not liable in damages for the obstruction to the owner of such adjoining premises, since no legal right to light, air, and prospect exists, in the absence of proof that such a right has been acquired by grant or prescription; nor is such fence or wall, not being constructed of offensive materials, to be deemed a nuisance. *It seems* that the doctrine of "ancient lights" is not applicable in this country.

Appeal from circuit court, Cook county; JOHN G. ROGERS, Judge.

Sleeper & Whiton, for appellants. A. Garrison, for appellee.

BRESEE, C. J. This was an action on the case, brought to the circuit court of Cook county, to recover damages for an alleged obstruction by defendants of the free use of the light and air passing laterally over the premises of defendants to plaintiff's premises.

The declaration contains two counts, in substance as follows: Plaintiff, after averring his residence on a particular lot, 73 South Sangamon street, in Chicago, in a house having doors, windows, and views of the street, through which light, air, and views had and ought to enter into the dwelling-house, and the views should not have been obstructed, and the use of the light and air and views should not have been obstructed, and ought to be used by plaintiff and his family, for the wholesome use and occupancy thereof, avers: Yet the said defendants, well knowing the premises, but contriving, wrongfully and unjustly intending, to injure the plaintiff and his family, and to deprive them of the use of said doors, windows, and views, and to incommode him in the use and enjoyment thereof, and to annoy plaintiff in his use and possession and enjoyment of said premises, on, etc., wrongfully and in-

juriously caused and erected and raised a high board fence, and caused to be erected, constructed, and raised on the north part of said lot and dwelling-house and lot, and adjoining thereto, a high board obstruction. The obstruction was made and constructed next to the north line of the house and lot No. 73 South Sangamon street. It was made upon the south line of an alley next north of said house and lot, and close adjoining, and was so made and constructed, and is now standing, and in such close proximity, that it hides the original fences. It nowhere protects the alley, and it is so raised and constructed, and of such height, made at certain places in its construction, and so near to the windows, that it wrongfully and injuriously darkens the said dwelling-house, obstructs the light to said windows, and is so made as to obstruct the view to said street, and in fact is so constructed, wrongfully and injuriously, as aforesaid, as to interfere with the use of, and the light and air and views from, said dwelling-house, and thereby renders said dwelling-house of but little use to plaintiff and his family; and defendants have wrongfully and injuriously kept and continued said high board fence obstruction, etc., by them erected, as aforesaid, for a long space of time, to-wit, etc.; and the same is now continued, by means of which premises the said dwelling-house, with its appurtenances, are greatly darkened and injured, and they continued darkened and injured, and the light, air, and views were and are hindered and prevented from coming into and through the said windows, into said dwelling-house, and the same hath thereby been rendered, and is, close, uncomfortable, unwholesome, and measurably unfit for habitation; and plaintiff and his family have thereby been, and still are, greatly annoyed and incommoded in the use, possession, and enjoyment of said dwelling-house and lot, with the appurtenances, to-wit, etc.; to the damage, etc. The second count, omitting the formal and introductory parts, avers: Yet the said defendants, well knowing the prem-

ises, but continuing, etc., and intending to injure and prejudice plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of said dwelling-house, with the appurtenances, heretofore, to-wit, etc., (with a *continvando*.) wrongfully, maliciously, willfully, and injuriously greatly darkened said windows, and hindered and prevented the light and air from coming and entering into, into and through said windows, into said dwelling-house and premises, and the same have thereby been rendered, and are, uncomfortable, unwholesome, and unfit for habitation, and the plaintiff thereby has been, and is, greatly annoyed and incommoded in the use, possession, and enjoyment of said dwelling-house and premises, with the appurtenances, to his damage, etc. The plea was, not guilty. Under instructions from the court, the plaintiff had a verdict for \$888, a portion of which was remitted, and judgment rendered for \$500. To reverse this judgment defendants appeal.

We have copied literally the counts of the declaration, in order that the precise nature of the action may be seen and understood. Appellee claims that the *gravamen* of the action is not for obstructing light and air and views, but it is for erecting an unsightly fence and of offensive materials. The logic of the *narr.* certainly is that, plaintiff having theright to use the light and air and views, he has been deprived of the same by the erection of the fence, and by which erection his dwelling has been darkened, rendered unwholesome, and unfit for habitation. The latter is alleged as a consequence of the erection of the fence, and the right to build the fence is denied, because of plaintiff's right to have free course for light and air, and an unobstructed view from his windows. The *gravamen* of the action most clearly is the obstruction of light, air, and view, the rest being consequences, merely, of the obstruction. It is not alleged the materials which composed the obstruction—the fence—were of an offensive nature, or that the air, in passing through or over the fence, became charged with offensive matter. The averment simply is, by erecting a fence, the passage of light and air has been obstructed, by which the dwelling has been darkened, rendered unwholesome and unfit for habitation.

In this view of the nature of the action, the first question to be determined is, were defendants' lots, on the south boundary of which they erected this fence, servient lots? In other words, had the plaintiff any right to the passage of light and air laterally over defendants' lots, to plaintiff's doors and windows, and to an unobstructed view of an adjacent street? If he had, whence does he derive it? This is for him to show, and he has not shown it. He shows no right by prescription, by use for 20 years, if such use could be available, and no grant from any one. The owner of the premises erected the dwelling-house occupied by plaintiff within two feet of the south line of defendants' premises. We have been referred to no law forbidding defendants from erect-

ing a fence on the line of their own land. Admit the erection does darken the rooms of his neighbor; that it does render them close and uncomfortable, and annoy and incommode him,—the defendants have only exercised a right belonging to them by building the fence. This is not a case of ancient lights. The plaintiff insists it is for a nuisance arising out of a violation of the maxim, *sic utere tuo ut alienum non lædas*. It is not denied that, by the common law, an action on the case lies for a nuisance to the habitation or estate of another, many instances of which are readily found in the books; and, among the many hundred, one is now before us, in 10 Adol. & E. 590, (*Flight v. Thomas*,) and is germane to this case. That was an action for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about the house. The defendant pleaded the enjoyment, as of right, for 20 years of a mixen (compost heap or dung-hill) on his land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen. This plea was traversed, and there was a verdict for the defendant. In the king's bench the plea was held bad, and the plaintiff entitled to judgment, as it did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had in fact been used to pass beyond the limits of defendant's own house. The law unquestionably is, if a man erect anything offensive so near the house of another that it becomes useles thereby, case lies; as, a limekiln, a dye-house, a tallow furnace, a privy, a brew-house, a tan-vat, a smelting-house, and the like. But it does not lie if a man builds a house and makes cellars on his soil, whereby a house newly built on the adjoining soil falls down; so, if by such building he stops lights newly made in the house of another, though the lights have continued for 30 or 40 years. In all the cases where it was held the action would lie, a positive right was invaded. If this was a case of ancient lights, the maxim would apply. But, plaintiff having established no right, he cannot claim to be injured or damaged, as no right is infringed,—legally speaking, there is no injury or damage. The defendants cannot be charged with so using their own property as to injure another. By the fence the plaintiff has been deprived of the use of that which did not belong to him, for light and air are not the subjects of property beyond the moment of actual occupancy. *Mahan v. Brown*, 13 Wend. 261; *Parker v. Foote*, 19 Wend. 309.

That the defendants had the right to build a fence 50 feet high, on their own land, or a high wall which should have the effect to deprive plaintiff of light and air, and obstruct his view, the plaintiff himself showing no prescriptive or other adverse right, is settled by authority. The case of *Gerber v. Grabel*, 16 Ill. 217, is referred to on this question. There the declaration did not prescribe for ancient lights, but declared generally, as in this case, that plaintiff was possessed of the

house, and ought to enjoy a right to the light and air through the windows. The court held the declaration was sufficient to admit proof of the right, whether it arises upon a prescription, by contract, or otherwise by estoppel. The English doctrine was fully examined and admitted by one of the judges, Mr. Justice SCATES delivering the opinion, that the rule in England was the presumptive prescription of 20 years, applied in analogy to the statute of limitations. But, he said, such was not the rule of the common law of this state; and, discussing the older authorities, from Rolle's Abridgement, through Coke, down to Croke's Eliz., to the accession of James I., the learned judge reached the conclusion that a prescription of 20 years for the easement of light and air was not applicable to the circumstances of this state, unsettled and unimproved as it is; that the doctrine cannot be traced further back than the twenty-first year of James I. He then treats of the distinction between easements which require the actual use of the property of another, such as commons, a way, etc., and proceeds: One has no property in a prospect, nor in the light and air that pass across his land. He may, when he pleases, deprive another of the prospect; but in regard to easements of the other description, suffering the use of it, with a knowledge of it by him out of whose estate it is claimed, and without his express consent, might well raise a presumption of a grant or existing right from silence and inaction, and a much shorter period would be satisfactory and subserve the ends of justice. "But," he says, after an extended argument of this branch of the subject, "no part of this reasoning will apply to an incorporeal servitude of light and air. It was well said in *Bury v. Pope*, Cro. Eliz. 118, that it was his folly to build his house and put his windows upon another's line, and 30 or 40 years' use shall not debar the other from building on his line adjoining. This folly is no invasion of or injury to the adjoining proprietor's property or right, while his property lies vacant. There is no wrong to complain of, or injury to redress, as in the class of easements referred to. It cannot, therefore, become an easement or servitude upon the land, until it begins to operate upon the owner's right of obstructing the light and air." He then asks this question: "When does this servitude begin?" The answer is, "At the precise period when man's memory of its beginning is lost." "Such," he insists, "was the common law of our adoption, and its adaptation is as well-suited in all things to us as to any people or country." As we understand this opinion, the right to the free passage of light and air must be established for a length of time whereof the memory of man runneth not to the contrary,—that is, from time immemorial; and this was the common law, as understood prior to the accession of James I. Another distinguished judge, Mr. Justice CATON, whose ability and great legal knowledge have never been questioned, understood the first section of chapter 62, Rev. St., adopted the common law of

England as administered in Westminster Hall at the time the provision was originally adopted in this state, and the British statutes in aid of the common law prior to the fourth year of James I., except as provided in that section; and it was admitted that, by the well-settled rule of the common law, as it has been understood and administered by the English courts for many years past, 20 years' uninterrupted and unquestioned enjoyment of lights constitutes them ancient lights, in the enjoyment of which the owner shall be protected. TREAT, C. J., dissented, but filed no opinion, by which dissent we infer that he did not agree with either of his associates. This is the only case in this court we have been referred to touching this subject, and from it it will be seen the law has not been authoritatively declared, enough only appearing in the record to dispose of the case then pending.

But be the law 20 years, or time immemorial, in which to prescribe, it cannot avail the plaintiff in this action, as he established neither. The declaration in the case is drawn from a precedent in 2 Chitty on Pleading, 769, with some slight variations, which is there prescribed in an action on the case for obstructing ancient windows. An action on the case for a nuisance lies not, if one builds a house or other structure, whereby the prospect of another is interrupted. Aldred's Case, 9 Coke, 58. It does not lie for a reasonable use of one's right, though it be to the annoyance of another. So if, by such building, he stops lights newly made in the house of another, though the lights have continued for 30 or 40 years. Com. Dig. 429. The doctrine of the common law, as found in Washburn on Easements and Servitudes, is that an adjacent owner may deprive his neighbor of the light coming laterally over his land, by the erection of a wall on his own land, within the period of prescription, although he does it for the mere purpose of darkening his neighbor's windows. Page 491. In *Chandler v. Thompson*, 3 Camp. 82, LE BLANC, J., said, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action to be maintained; and he had heard it said by EYRE, C. J., that such an action did not lie, and that the only remedy was to build on the adjoining land opposite the offensive window.

The complaint in this declaration is for erecting an obstruction, by which light and air were prevented from coming into plaintiff's house, rendering the rooms dark, unwholesome, and uninhabitable. The point is that defendants had a right to erect the fence, which was the obstruction alleged. The plaintiff, showing no right to the free passage of light and air, must submit to this erection, in the absence of any allegation that the fence was made of unfit materials, the odor from which was of a noxious nature, which, penetrating the house of plaintiff, rendered it unwholesome. To entitle him to claim damages for the erection of a fence, by which his dwelling was darkened and

made unwholesome, he must show a prescriptive right to the use of the light and air, which he does not pretend. He cannot make one case in his declaration, and another and different case by his proofs. He declares against the defendants that he is possessed of a dwelling-house, with doors and windows, to and through which light and air ought to come freely, but you, the defendants, have obstructed their free passage, by which my house is darkened, rendered unwholesome, and unfit for habitation. This is his whole case, as he states it in the declaration. We submit, it is not competent for him on the trial, to prove that the materials out of which the fence was made were filthy and unfit, or that they created an atmosphere in the house which was noxious, for that is an independent cause of action.

Now, on the question of prescription. As it is an open question in this court, we are inclined to adopt the views held and so well expressed by the supreme court of the state of New York in *Parker v. Foote*, supra. In commenting on the doctrine as received by the British courts, the court say: "They tell us a man may build on the extremity of his own land, and that he may lawfully have windows looking out upon the land of his neighbor." The court say the reason why he may lawfully have such windows should be because he does his neighbor no wrong; and yet, somehow or other, by the exercise of lawful right in his own land for 20 years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains yet to be settled. And the court further say there is no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and has been sanctioned, with some qualification, by act of parliament, but it cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law. In *Myers v. Gemmel*, 10 Barb. 537, this case is approved. In 3 Kent, Comm. 573, it is said the English doctrine is not much relished in this country, owing to the rapid changes and improvements in our cities and villages. A prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights and views and prospects, or, on the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with low and back buildings upon them. To the same effect is *Washburn on Easements and Servitudes*, 497. We are disposed to concur in this view, and to hold it absurd to say that a man, by the exercise of rights over his own property for 20 years, can thereby acquire a title in the property of an-

other. Such a doctrine is not applicable to our growing cities and villages, and was not the doctrine of the common law, as expounded in Westminster Hall prior to the fourth year of the reign of James I. These views render it unnecessary to consider the instructions given in this case, as it is readily seen some of them were not applicable. As we understand the declaration, there is no cause of action stated in it to entitle the plaintiff to a recovery, and we must reverse the judgment. The judgment is therefore reversed, and the cause remanded.

Judgment reversed

(104 N. Y. 471, 11 N. E. Rep. 57.)

MILLER v. WOODHEAD.

(*Court of Appeals of New York*. March 1, 1887.)

NEGLIGENCE — DANGEROUS PREMISES — LANDLORD AND TENANT.

Rooms, the windows of which overlooked an extension of the same house, were let by the owner of the whole building to a tenant, with the right to the latter to use the roof of the extension for drying clothes. In the roof near the windows was a sky-light, covered with a wire screen for the protection of the glass in it, but the screen was in bad condition, and was afterwards removed. Before it was replaced, plaintiff, a child about three years of age, while visiting the tenant, fell out of the window, through the sky-light, and was injured. *Held*, that the owner of the house was not liable to plaintiff for such injuries; there was no violation of any duty which he owed plaintiff; and, even if the screen was necessary to render the roof fit for the use of the tenant, plaintiff could not take advantage of any violation of the owner's duty to the tenant in that respect, as he was not, at the time of the accident, connected in any way with the tenant in the use of the roof.

Reversing 36 Hun, 643, *mem*.

Appeal from supreme court, general term, first department.

Action by Samuel L. Miller, an infant, against Richard Woodhead, to recover damages for personal injuries to plaintiff alleged to have been caused by defendant's negligence.

Henry P. Starbuck, for appellant. *J. Gray Boyd*, for respondent.

PECKHAM, J. The defendant was the owner of a house in Thirty-Third street, New York, some rooms in which he had rented to a Mrs. O'Brien, who was the step-mother of the plaintiff's mother, the plaintiff being an infant of about the age of three years. Mrs. O'Brien had three rooms in the rear of the house, overlooking an extension thereof, which was covered with a tin roof, and in which there was a sky-light to give light to a saloon situated in such extension. Mrs. O'Brien had leased the right to use this roof for the purpose of hanging out and drying her clothes, and when she rented the rooms the defendant had cautioned her about not letting children out on the roof, because the ceiling was very bad, and she had never allowed them to go there. This tin roof was about a foot below the windows of Mrs. O'Brien's rooms, which looked out on it. About 16 or 18 inches from the wall in which the windows were set the sky-light in question was situated, so it was about a foot below the win-

dows, and 16 inches away from the wall. The sky-light had panes of glass in it, and there had been a wire screen over the glass, made of long and small wires, very thin, and in bad condition,—old and rotten. This screen had been taken off the sky-light some six weeks prior to the accident, and, at the time of its occurrence, had not been replaced. The glass in the sky-light would have been very likely broken if not covered, as the boys used to climb up a ladder and play ball about there. The sill of the windows from the floor inside was about 23 inches, and, in order to go out on the roof from the rooms occupied by Mrs. O'Brien, it was necessary to raise the window and crawl through the lower part of it. The permission given by the defendant was to Mrs. O'Brien to go out on the roof and dry her clothes there. There were no bars on the window, and if there had been she says she would not have taken the premises. On the day in question the mother of plaintiff, with a babe in her arms, and accompanied by plaintiff, called at Mrs. O'Brien's, and, as they went in the room, plaintiff's mother started to put the babe on a bed in the bed-room off the kitchen, and was gone but a few seconds, when Mrs. O'Brien saw the plaintiff, who had gone to the window, tumbling out. She caught sight of him just as he was disappearing. He fell through the sky-light, and sustained injuries to his head, etc., for which he brought this action. Mrs. O'Brien gave it as her opinion "that, if the wire had been on, it had been all right for the boy." From her own description, it is perfectly obvious the wire screen was not placed there to catch people, or prevent their falling through the sky-light, but for the purpose of saving the glass in the sky-light. The plaintiff recovered a verdict, which has been affirmed at the general term, and the defendant appeals here.

Upon the case as made by the plaintiff, we are unable to see that any proof was given of the violation of any duty which the defendant owed to the plaintiff. The roof over the saloon, or the sky-light therein, was not a dangerous structure, and defendant had given no invitation, and issued no license, expressed or implied, to plaintiff to go upon the roof. Mrs. O'Brien had the right to go on it for the purpose suggested, and very likely any agent or servant of hers engaged in that occupation for her. This is no such case. If there had been no roof at this place, the plaintiff would, on falling out of the window, have come to the ground. Can it be contended, in such case, the defendant would have been liable? If not, how is his liability increased by the fact that there is a roof just below these windows, but in it there is a sky-light which a child's weight could break? If the defendant owes no duty in the one case to build a roof or a wall or any other structure under these windows to catch people who fall out of them, how is his liability increased when he does build a structure with a roof, but which does not absolutely prevent one from falling through it because of a sky-light?

But the liability seems to have been placed, in the court below, upon the duty which it is said the defendant owed Mrs. O'Brien to furnish her a reasonably safe roof when he let her the right to go upon it to dry clothes. If that be assumed, we do not see how plaintiff is aided. Mrs. O'Brien was not injured, nor any of her servants, by reason of the unfitness of the roof for the purpose for which it was to be used by her or them. The plaintiff was not injured while he was using the roof at all. He simply fell out of a window, (as the evidence shows beyond all question,) and thus received his injury. What had the liability (whatever it was) of defendant to Mrs. O'Brien to do with this question between plaintiff and himself, as the plaintiff was not using the roof for any purpose whatever? Conceding that to fulfill his obligations to Mrs. O'Brien, and to render the roof fit for her to use for the purpose spoken of, this wire screen was a necessity, and that if it had been there on this occasion the plaintiff would not have been hurt, still there was no duty owing by him to this plaintiff to have the roof in that condition, so that he could be caught when he fell out of the window, and the injury thus be averted. The duty of defendant to Mrs. O'Brien, in order to fulfill his contract with her in granting her permission to use the roof, is one thing; but the plaintiff cannot take advantage even of its violation, unless at the time when the accident happened he was himself in some way connected with her, as in the performance of the duty for her, or in using the roof with her license, (even if that would raise a duty,) and in carrying out some right which she had herself. This case has none of these features. The duty of defendant may be one thing to Mrs. O'Brien and quite another to the plaintiff. *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. Rep. 752. We think this case not distinguishable in principle from *McAlpin v. Powell*, 70 N. Y. 126. The judgment of the general term and of the circuit should be reversed, and a new trial ordered, costs to abide event. All concur.

(86 Pa. St. 74.)

GRAMLICH v. WURST *et al.*

(*Supreme Court of Pennsylvania.* Jan. 28, 1873.)

NEGLIGENCE — DANGEROUS PREMISES — INJURY TO TRESPASSER.

A lawful occupant of land at a distance from any public highway, who makes an excavation thereon for a lawful purpose and in the accustomed manner, is not liable for injuries received by a trespasser from falling into the excavation. In the absence of exceptional hazards, he is not required to provide exceptional safeguards. *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, distinguished.

Error to court of common pleas, Philadelphia county.

Action on the case by Mary Wurst and others, the widow and infant children of John A. Wurst, deceased, against Frederick Gramlich, for damages for the death of said John A. Wurst, alleged to have been caused by defendant's negligence.

At the trial defendant submitted several points, among them the following: "(3)

The place of this excavation being on private property, and not on any line of street or public highway, but some distance therefrom, the said decedent, not being engaged in any manner whatever by the said defendant or his agents, had no right to be there, and was a trespasser, and the verdict should have been for the defendant." The judge presiding at the trial refused this point, and instructed, in part, the jury as follows: "Now, as to the defense, it is contended by defendant: *First*. That there is no direct evidence how the accident happened, and therefore no sufficient evidence of defendant's negligence. In support of this view, defendant's counsel has called your attention to the fact that Wurst, when he fell in, was not on his route home from the place where he was last seen at work. His home was in another direction. Further, he was a trespasser on the lot where the excavation was, and had no legal right to be there at all. I instruct you that those facts do not absolutely prevent a recovery by the plaintiffs. A man is bound to exercise reasonable care even towards a trespasser. But these facts bear very strongly on the question of what was reasonable care on the part of defendant under the circumstances,—in other words, of his negligence; and also of the negligence of the deceased. A trespasser is bound to proceed with more care than where he has a right, and, on the other hand, the defendant was not, in ordinary circumstances, bound to anticipate a trespass. *Secondly*. Has the plaintiff proved to your satisfaction that, under all the circumstances of the case, the defendant was guilty of negligence?" And after reviewing the evidence the judge continued: "Now, you are to judge from all this evidence whether the defendant was negligent in leaving his excavation without lights and without a fence, under the special circumstances of that night. There had been a serious accident, resulting in loss of life, and there was, according to all the testimony, a crowd of people about the place all the afternoon. This in itself would impose on the defendant more care in regard to his excavation than under ordinary circumstances. It increased the danger of injury to trespassers, as to whom, as I have already said, the defendant owed the duty of a reasonable care; not such degree of care as required as to people who should be habitually and lawfully there, but such as, under all circumstances, was reasonable to require, even as to others. In judging of this care, however, the defendant is entitled to have you consider the facts that this was an extraordinary occurrence, such as he was not bound to and in fact could not anticipate; that the street was not opened through for public travel; that the ground between the fallen ice-house and the edge of this excavation was not only steep and up-hill, but was also incumbered with piles of lumber and the *débris* of the fallen ice-house, so as to make it unlikely that any one would clamber over them from that direction; and, in general, the want of probability that any person would be injured by falling into his excavation. *Last*—

ly. You will consider the question whether the deceased was negligent in going towards the cellar on a dark and rainy night," etc. The judge then stated the law as to contributory negligence, and, calling the attention of the jury to the care incumbent on deceased under the circumstances, instructed them that contributory negligence on his part would bar a recovery. The jury found a verdict for plaintiffs for \$4,000. Plaintiff subsequently filed a *remittitur* of \$1,000 of that amount. Defendant sued out a writ of error, and assigned as error the refusal of the judge to affirm the point mentioned.

Argued before AGNEW, C. J., and SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD, and TRUNKY, JJ.

George W. Dedrick and David W. Sellers, for plaintiff in error.

Deceased was in defendant's close without right or permission. An owner of private property owes no duty to a trespasser. Injury to trespassers is without remedy, because property is not owned or used with any contemplation of them. *Railroad Co. v. Hummell*, 44 Pa. St. 375; *Mulherrin v. Railroad Co.*, 81 Pa. St. 375. In *Allen v. Willard*, 57 Pa. St. 374, the person injured was traversing the highway adjoining which was the excavation.

Walter J. Budd and John B. Devine, for defendants in error, relied on *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Railroad Co. v. Hummell*, 44 Pa. St. 375.

WOODWARD, J. John Adam Wurst was killed by falling into a vault which Frederick Gramlich, the defendant below, was employed in excavating on a lot belonging to Adam Miller, on the east side of Thirty-First street, above Jefferson. The work was done under a contract between Gramlich and Miller, and for the purposes of the contract Gramlich had exclusive possession of the lot. Another person had fallen into the vault, and, in approaching to aid him in response to his cries for help, it is probable that Wurst met with the accident that caused his death. In falling, his head struck the shaft of a cart that was in use in doing the work, and which had been left overnight in the excavation. It was after dark, on the evening of the 13th of February, 1874, that the accident happened. On the morning of that day the roof of an ice-house on a lot of Henry Miller, intervening between Adam Miller's land and Jefferson street, had broken down, and Wurst, who was a carpenter, had been at work on that building during the whole of the afternoon. Michael Gossy, one of the witnesses for the plaintiffs, said he saw him about half past 3 o'clock on the top of the brewery getting wood down, and Henry Miller said: "Wurst was there before I was, clearing off the roof. It was a little after 12 o'clock when I arrived there. As long as I stood there he was working there. He was there until after seven o'clock. He was hauling away timber. It was hauled to the north side, between my brewery and the vault Mr. Gramlich was digging." There was an open space between Henry Miller's building and Adam Miller's line, and from the account which the plaintiffs gave of

Wurst's employment during the day the fact that the excavation was being made must have been known to him, and the situation of the vault when the work ceased that evening must have been within his view. When he fell he was passing from the land of Henry Miller near the rear of Adam Miller's lot, and perhaps 80 feet eastwardly from the Thirty First street front.

Under these facts,—and all of them that are material are gathered from the testimony on behalf of the plaintiffs,—what duty did Gramlich owe to Wurst? The contract for digging the vault was a perfectly lawful one, and it has not been alleged that the work was done otherwise than in the accustomed way. It was all done within Adam Miller's lines. No adjacent land was encroached upon, and no danger to passengers on any highway was created. Indeed, there was no highway to be involved in danger. Thirty-First street, north of Jefferson, had only been opened along the property of Henry Miller, and the surface of Adam Miller's lot at the line of the street was from 10 to 15 feet above its established grade. There was some conflicting testimony as to paths alleged to have traversed the lot, but, if there were such paths, they extended eastwardly or north-eastwardly in the direction of a lampblack factory, and it was not contested that Wurst fell into the vault as he approached it from the southern side. The existence or non-existence of paths across the property was immaterial. In the ordinary case, a jury must pass upon evidence given in support of a charge of negligence. They must do this always when the measure of duty is ordinary and reasonable care, and the standard of the degree of care shifts with the change of circumstances. And they must do it also where essential facts are controverted. But where there is no conflict of testimony, and either the standard of individual duty has been judicially determined, or the rights of owners of property have been judicially defined, the decision of a question of negligence affecting individual action in the one case, or the exercise of dominion over property in the other, becomes the duty of a court. Negligence is to be found upon evidence, and is not to be presumed from the bare fact of the occurrence of an accident on a defendant's land. Gramlich was in the lawful occupancy of the lot on which Wurst was killed, and was engaged in an employment that was entirely legitimate. In the absence of evidence to show the existence of exceptional hazards, he was not required to provide exceptional safeguards. An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner or to the public. A case as old as *Blyth v. Topham*, Cro. Jac. 158, held that "an action doth not lie if a man makes a ditch in his own waste, which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." Where A., who was the owner of a store-house and lot, left at the

rear of the store-house an excavation walled up to give light to the cellar, and B., who, on an alarm of fire, went down to the store-house, adjoining the house in which the fire was, and, entering at the front door, went through the store, and, going through the back door, turned off the gangway across the opening, and fell in and was injured, it was held that the digging of an open space in the rear of the store-house by A., upon his own ground, was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property; and B. falling in by accident, the same not being near a public street or crossing, gave no right to recover damages from A. as a wrong-doer, and B. going there on account of the fire did not change the rule. *Kohn v. Lovett*, 44 Ga. 251. The law fully recognizes the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong,—upon him who has wandered out of his way, though he may have been guilty of no negligence, in the ordinary acceptance of the term. It is purely *damnum absque injuria*. *Morgan v. City of Hallowell*, 57 Me. 377. "When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different." *MARTIN, B.*, in *Hardeastle v. Railway Co.*, 4 Hurl. & N. 67. So where the defendants were owners of waste land which was bounded by two highways, and they worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark and fell into the quarry and broke his leg, and then brought an action for the injury, it was held that the action could not be maintained, as there was no legal obligation on the defendants to fence the quarry for the benefit of the plaintiff, who was a mere trespasser on the land. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731. This rule was laid down by Chief Justice GIBSON in *Knight v. Abert*, 6 Pa. St. 472, which decided that, though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed woodland, yet that, not being a matter of right, the owner of the land is not liable for injuries sustained by such cattle falling into a hole dug by him within the boundaries of his land, and left uninclosed. And the opinions of Mr. Justice STRONG in *Railroad Co. v. Hummell*, 44 Pa. St. 378, and of Mr. Justice SHARSWOOD in *Gillis v. Railroad Co.*, 59 Pa. St. 129, illustrated and enforced substantially the same rule.

Reliance has been placed on the case of *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, to support this judgment. The distinction between that case and this is marked and obvious. There the accident happened in a private passage or cartway adjoining

a factory, where several kinds of business were carried on in different stores, and was caused by the falling of a heavy platform employed as an inclined plane to move heavy articles into and out of the building. When used, it was lowered so as to cover the pavement of the cartway. When not in use, it was raised on hinges that connected one side of it within 18 inches of the wall, was not fastened at the upper side, and was so nearly at equipoise that slight force only was required to draw it down. The cartway opened from a public street, where people were constantly passing and children were often at play. There was a gate at the street end, and this was frequently left open. It was so left at the time of the accident, when four children intruded into the cartway, and their thoughtless tampering with the platform resulted in drawing it down upon themselves, and in producing injury to the child of the plaintiffs from which he died. This court affirmed a verdict and judgment for damages in the common pleas. No cause was ever more justly decided. It was the case suggested by *Baron MARTIN in Hardcastle v. Railway Co.*, of a dangerous appliance adjoining a public way. The children were trespassers certainly, but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood. The entrance to the cartway was open and unguarded, and the facts in the record

showed the strong probability of danger from the structure. It had once fallen against the wheels of a wagon, and when other wagons passed it was held up by hand. Even a trespasser may have redress for negligent injuries inflicted on him. Though he is liable to an action for his own wrong, he does not necessarily forfeit his right of action for injuries he has sustained, as, for example, by falling into a hole newly excavated on a defendant's premises adjoining a public way, and rendering it unsafe to persons lawfully using the same with ordinary care. *Barnes v. Ward*, 9 C. B. 392, 420. The owner of open land has no right to plant in it spring-guns by which ordinary trespassers may be wounded. *State v. Moore*, 31 Conn. 479. In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instruments to injure persons merely straying on such land. *Johnson v. Patterson*, 14 Conn. 1. A party may be acting in violation of some particular statute, and still be under the general protection of the law. *Spofford v. Harlow*, 3 Allen, 176. *Hydraulic Works Co. v. Orr* rested on principles and precedents that sustained it amply, but which have no application here. The undisputed facts proved the defendant to have been guiltless of all wrong, and the prayer for instruction to the jury that he was entitled to a verdict should have been granted. Judgment reversed.

(See also, *Railroad Co. v. Schwindling*, 101 Pa. St. 253; *Gillespie v. McGowan*, 100 Pa. St. 144; *Galligan v. Manufacturing Co.*, 143 Mass. 527, 10 N. E. Rep. 171.)

The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort.

(11 Pick. 536.)

LAMB v. STONE.

(*Supreme Judicial Court of Massachusetts.*
Oct. Term, 1831.)

FRAUD—PURCHASE OF PROPERTY FROM ABSCONDING DEBTOR.

A creditor cannot maintain an action for fraud against one who has fraudulently purchased from the debtor property of the latter subject to attachment, and aided him to abscond, thereby preventing the creditor from arresting the debtor or attaching his property, or otherwise obtaining satisfaction of the debt; the creditor having had no lien or claim upon or interest in the property so purchased. *Adams v. Paige*, 7 Pick. 542; *Yates v. Joyce*, 11 Johns. 136; *Smith v. Tonstall*, Carth. 3, distinguished.

Motion in arrest of judgment.

Action on the case by Joseph Lamb against Richard Stone. The declaration contained five counts, of which the fourth alleged that one Thompson, at a place and on a date stated, was justly indebted to the plaintiff in the sum of \$56.13, and was possessed of certain property, to-wit, etc., of great value, to-wit, \$250; and the defendant, well knowing the premises, and fraudulently contriving to deprive the plaintiff of the means of obtaining payment of his debt, and in order to aid and abet Thompson in his designs to evade payment

of it, and thereby prevent the plaintiff from collecting and recovering it of Thompson, which he was about to do by due process of law, did fraudulently and wrongfully, and with an intent the plaintiff thereby to defraud and injure, take and receive the property from Thompson, and convert it to his (the defendant's) own use, and thereby prevented the plaintiff from collecting his debt by attaching and selling the property by due process of law, as he might and would otherwise have done; whereby the plaintiff has been ever since prevented from recovering his debt of Thompson, and wholly deprived of the benefit of the same, and the same is still due and unpaid. The fifth count alleges that whereas, Thompson, at the same place and on the same date, was indebted to the plaintiff in the sum of \$56, and was fraudulently and wrongfully contriving and intending to prevent the plaintiff from recovering the same of Thompson by putting out of his possession the property and estate of which he was possessed, so that the same could not be come at to be attached by due process of law, and avoiding the process of law provided for the collection of debts, by going out of the commonwealth and the reach of said process,—of all which the defendant was

then and there well knowing,—he, the defendant, did, in order to aid and abet Thompson in his wrongful and fraudulent intent, and with the intent to injure and defraud the plaintiff of his demand against Thompson, take into his possession, purchase, and receive, the property and estate of Thompson, then and there being found, of great value, to-wit, \$250, and did fraudulently, and with the intent to deprive the plaintiff of the means of recovering his debt of Thompson, aid, abet, and assist Thompson to avoid the process of law provided for the collection of debts, by departing out of the commonwealth, which Thompson did, and has ever since remained without the reach and effect of the legal process of the commonwealth, in foreign parts, to-wit, in the state of Vermont, whereby the plaintiff was deprived of the means of collecting his debt, as he might and would otherwise have done, and was about to do, by attaching the property or arresting the body of Thompson by due process of law; and has ever since been deprived of his debt, and all means of collecting the same or enforcing payment thereof, and has wholly lost the same, and has been otherwise greatly injured by the fraudulent doings of the defendant as aforesaid. The defense was the general issue. At the trial the jury found a general verdict for plaintiff. Defendant moved in arrest of judgment, on the ground that the declaration set forth no sufficient cause of action.

C. Allen and Mr. Barton, for the motion. Newton & Washburn, opposed.

MORTON, J. This case comes before us on a motion in arrest of judgment. The verdict of the jury establishes every material allegation in the plaintiff's declaration; and every fact substantially set forth is to be taken to be true. The question for our decision is whether these facts are sufficient to entitle the plaintiff to judgment. Although the verdict is general, yet in this case, if either count is good, the verdict may be applied to that count, and judgment be rendered upon it. The following are all the material allegations contained in either of the counts: That the plaintiff had a just debt due him from one Thompson; that the latter had property liable to attachment sufficient to pay this debt; that the defendant took a fraudulent conveyance of this property; that Thompson has absconded from the state; that the plaintiff has not been able to arrest him, to attach his property, or otherwise to obtain satisfaction of his debt; and that the acts done by the defendant were done with intent to defraud the plaintiff, by preventing him from securing or getting satisfaction of his debt. Some of these are omitted in several of the counts, but no one contains any other material allegation. Will these facts support an action?

Before proceeding to the investigation of the main question, it may be proper to remark that the declaration contains no averment that Thompson is insolvent, or that he has not, where he now resides, property liable to be taken sufficient to satisfy the debt, or that any suit has ever

been commenced against him, or any attempt made to arrest his body or attach his property; nor is it alleged, except by implication, that he has not in this state real estate or personal property, other than that transferred to the defendant, liable to attachment. It ought also to be further remarked that this is not an action of conspiracy or of case in the nature of conspiracy. It is not founded upon any illegal combination or confederacy. The declaration does not set forth any conspiracy to defraud the plaintiff or to evade or defeat any legal process. No such fact can be presumed to exist, and therefore we have no occasion to determine what effect such an averment would have. It will, however, be perceived that some of our reasoning would apply to such an action as well as the one before us.

This is a special action on the case, depending upon the precise facts set forth in the declaration. It is an action of new impression. It is admitted that no precedent can be found for it. This circumstance of itself forms a pretty strong objection. It ought, however, to have less weight in this than any other form of action. In the diversified transactions of civilized life, new combinations of circumstances will sometimes arise which will require, in the application of well-settled principles of law, new forms of declarations. Among the old and wise axioms of the law, none are more sound than those upon which the plaintiff attempts to found this action. In law, for every wrong there is a remedy. 3 Bl. Comm. 123; *Ashby v. White*, 1 Salk. 21. Whenever the law creates or recognizes a private right, it also gives a remedy for a violation of it. 1 Chit. Pl. 83; *Yates v. Joyce*, 11 Johns. 140. The general principle, that whenever there is fraud or deceit by the one party and injury to the other, or *damnum cum injuria*, there an action will lie, is very often referred to with approbation, and always recognized as good law. *Upton v. Vail*, 6 Johns. 182; *Pasley v. Freeman*, 3 Term. R. 51; *Eyre v. Dunsford*, 1 East, 329. But these principles, however sound, must be understood with such qualifications and limitations as other principles of law equally sound necessarily impose upon them. It is very clear that there may be many moral wrongs for which there can be no legal remedy. And there may be legal torts in which the damage to individuals may be very great, and yet so remote, contingent, or indefinite as to furnish no good ground of action. 3 Term. R. 63. Without entering further into the explanation of these principles, their extent, qualifications, or limitations, we will proceed to inquire how far they may be relied upon in support of this action. To render them applicable, the plaintiff must show that he has sustained damage from the tortious act of the defendant, for which the established forms of law furnish him no remedy. If he may have redress by any of the forms of actions now known and practiced, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully fore-

seen. The court will adopt a new remedy to prevent the failure of justice, or to enforce the settled principles of law, but never when justice can be attained by any of the remedies already known to the law. Com. Dig. "Action on the Case," B, 8.

The gist of the injury complained of is the fraudulent purchase by the defendant of the property of the plaintiff's debtor. If the sale was fraudulent, it might be avoided by the creditors, and the property was liable to attachment after as well as before the conveyance. The fraud could be established quite as easily in a suit for the chattels themselves as in the present case. There is no averment that the defendant had concealed the property, removed it out of the commonwealth, or in any other way so disposed of it that it could not be attached. But even if it were so, and the property could not be come at to be attached specifically, yet it might be attached in the defendant's hands by the trustee process. In this event the defendant would be compellable to disclose all the circumstances attending the transaction on oath, and, if he did not answer truly, would be liable to a special action on the case, by St. 1794, c. 65, § 9. It would be difficult to show any good reason why the plaintiff might not obtain legal justice in the one or the other of these modes, as easily and surely as by the present action. *Burlingame v. Bell*, 16 Mass. 320; *Devoll v. Brownell*, 5 Pick. 448.

It was said in argument by the plaintiff's counsel that, if he resorted to the trustee process, the defendant would be entitled to any equitable set-off which he might have against his principal; that, if he had made advances or paid debts in good faith, he would be allowed to apply them towards satisfaction for the property conveyed to him; and so the plaintiff could not avail himself of the full value of the property. *Andrews v. Ludlow*, 5 Pick. 32; *Ripley v. Severance*, 6 Pick. 474; *Type & Stereotype Foundry Co. v. Mortimer*, 7 Pick. 166. And why should it not be so? If the defendant paid *bona fide* the value of the property, the plaintiff is not injured. The owner had good right to sell to whom he pleased, and to prefer any other of his creditors to the plaintiff. If the fraudulent conduct of the defendant has done no injury to the plaintiff, he cannot complain. He cannot have the aid of the law to speculate upon the defendant's fraud. The law will protect him from damage, but will not enable him to derive advantage from the fraudulent conduct of the defendant. This action, if sustained, would establish a precedent which would produce in practice great inconvenience, and oftentimes do manifest injustice. If the plaintiff may maintain this action against the defendant, so may every creditor of Thompson. The plaintiff had done nothing to give him priority. Shall the fraudulent purchaser be holden to pay all the debts of the fraudulent vendor? Justice does not require this. The conveyance might be fraudulent in law, and yet there might be no moral turpitude in the transaction. The property conveyed

might be very small, and the debts very large. Shall the value of the property transferred be apportioned among all the creditors? By what rules shall the apportionment be made? Shall the creditor who first sues be entitled to the whole, if his debt be large enough to require the whole for its satisfaction? If one creditor should attach the property specifically, another should summon the fraudulent vendee as trustee of the vendor, and a third should commence an action like this, which would have the preference? Can the same party resort to more than one of these remedies at the same time? And would the judgment in the one be a bar to the other? Many cases might occur in which it would be extremely difficult to adopt any rule of damages which would do justice to all the parties interested.

But besides these practical inconveniences, which are of themselves insurmountable, there is another objection fatal to the present action. The injury complained of is too remote, indefinite, and contingent. To maintain an action for the deceit or fraud of another, it is indispensable that the plaintiff should show, not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained. What damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he never had procured any writ of attachment against him. He has lost no claim upon or interest in the property, for he never had acquired either. The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing his intention. Is this an injury for which an action will lie? How can the secret intentions of the party be proved? It may be he would have changed this intention. It may be the debtor would have made a *bona fide* sale of the property to some other person, or that another creditor would have attached it, or that the debtor would have died insolvent before the plaintiff could have executed his intention. It is therefore entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satisfaction from property of his debtor, or his debtor may return and pay him. On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent to be the ground of an action.

Among the many cases cited by the plaintiff's counsel, those of *Adams v. Paige*, 7 Pick. 542; *Yates v. Joyce*, 11 Johns. 136; and *Smith v. Tonstall*, Carth. 3,—

bear the greatest resemblance to the case at bar. But an examination of these cases will not only show that there is an obvious and broad distinction between them and the one under consideration, but that the principles adopted in all of them support the ground now taken by the court. In *Adams v. Paige* the plaintiffs had made an attachment of the property of their debtor. The two defendants, one of whom was the debtor, had caused a previous attachment to be made of the same property on a fictitious debt which they had created for the purpose of preventing attachments on *bona fide* debts. The suit upon which the fraudulent attachment was made was pursued to judgment, the property attached was sold on execution, and the proceeds of the sale remained in the hands of the fraudulent judgment debtor. Now, by these conclusive acts, the plaintiffs' attachment was defeated, and the price of the property, which but for the fraudulent acts of the defendants would have been applied to the satisfaction of the plaintiffs' execution, was holden by one of the defendants. Here the loss of the debt was the consequence of the loss of the lien, and the loss of the lien was the clear and certain consequence of the fraudulent conduct of the defendants. The injury was direct and certain, and the damages easily shown and defined. The justice of the plaintiffs' claim was very obvious, and their recovery founded on the soundest principles of law. Besides, if we were looking for distinctions between *Adams v. Paige* and the case at bar, it would be sufficient to state that the former was an action for a conspiracy between two, to defraud the plaintiffs by

means of a fictitious debt and a collusive judgment, in which the unlawful confederacy was the gist of the action. In *Yates v. Joyce*, the plaintiff, by means of a judgment against his debtor, had, according to the laws of New York, acquired a lien on certain property, which was injured and reduced in value by the tortious acts of the defendant, so as to be insufficient to satisfy the plaintiff's judgment. The plaintiff suffered an injury for which he had no other remedy. The damage was definite and certain, and was the direct and necessary consequence of the defendant's tort. His right to recover was unquestionable. The old case of *Smith v. Tonstall*, Carth. 3, is very similar, and rests upon the same principle. The plaintiff having obtained a judgment against one S., the defendant procured S. to confess a judgment to himself when nothing was due to him. This collusive judgment was satisfied by the sale of goods on which the plaintiff, by his prior judgment, had acquired a lien; thus placing in the defendant's hands the price of goods which were liable for the plaintiff's judgment. In all these cases the plaintiffs had a clear and valuable interest in or lien on certain property, which was defeated or destroyed by the tortious acts of the defendants. Not so in the case at bar. The plaintiff does not allege that he had any special property or any interest in or claim on any property which was destroyed or injured by any act of the defendant. And we are all of opinion that he has not set forth any such ground of action as can be sustained upon any known principles of law. *Vernon v. Keys*, 12 East, 632. Judgment arrested.

(See, also, *Randall v. Hazelton*, 12 Allen, 412; *Hutchins v. Hutchins*, 7 Hill, 104; *Heywood v. Tillson*, 75 Me. 225; *Bradley v. Fuller*, 113 Mass. 239; *Long v. Warren*, 68 N. Y. 426; remarks of STEPHEN, J., in *Alderson v. Maddison*, 5 Exch. Div., at page 296; remarks of Lord HERSCHELL in *Derry v. Peek*, L. R. 14 App. Cas., at page 376.)

Illustration of the establishment of legal rights by the common law, as, e. g., in the decision of "cases of novel impression."

(L. R. 9 Exch. 218.)

**WESTERN COUNTIES MANURE CO. v. LAWES
CHEMICAL MANURE CO.**

(Court of Exchequer. June 9, 1874.)

**WORDS ACTIONABLE—DISPARAGEMENT OF QUALITY
OF GOODS.**

An untrue statement disparaging the goods of another, made without lawful occasion, and causing special damage to the owner of the goods, is actionable. *Young v. Macrae*, 3 Best. & S. 264, distinguished.

Action by the Western Counties Manure Company against the Lawes Chemical Manure Company. The declaration alleged that "at the time of the committing, etc., the plaintiffs carried on business as manufacturers and sellers of artificial manures, and had upon sale certain artificial manures, and the defendants also carried on business as manufacturers and sellers of artificial manures, and had on sale certain artificial manures; that the defendants, well knowing that the plaintiffs were carrying on the aforesaid busi-

ness and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their business, falsely and maliciously printed and published, and caused to be printed and published, of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, the words following: 'Chemical Laboratory, University of Glasgow, January 29, 1873. Dear Sir: I inclose herewith analysis of your four samples of manure, which differ much in quality. They are all mixtures, and do not consist of bones and acid alone. No. 2 [meaning thereby the defendants' artificial manures] is much the best, and seems to contain some kind of phosphatic guano. No. 4 [meaning thereby the plaintiffs' said artificial manures] appears to contain a considerable quantity of coprolites, and is altogether an article of low quality, and ought to be the cheapest of the four. The other two are fair articles, and may be usefully employed. It is not for me to put an exact

value upon the samples, as the prices charged for manures in different parts of the country differ to an extraordinary extent. I know places where No. 2 [meaning the defendants' said artificial manures] would be sold at about 8*l.* per ton; others, where 7*l.* would be its price. I may state, however, the relative values thus: Suppose the price charged for No. 2 [meaning the defendants' said artificial manures] to be 8*l.* per ton. Then No. 1 should be worth 7*l.*; No. 3, 5*l.* 10*s.*; and No. 4, [meaning the plaintiffs' said artificial manures.] 5*l.* Of course, these must be taken as approximation only, and may be modified by the nature of the bargain; but they should be in these proportions." [Then followed an analysis in detail, purporting to show the proportion of phosphates and ammonia in the plaintiffs' and defendants' artificial manures, respectively.] Meaning thereby that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants. Whereas, in truth and in fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants. And by reason of the premises, [here followed an allegation of special damage.] "Demurrer and joinder.

Arthur Charles, in support of the declaration.

The malicious publication of a falsehood depreciating the plaintiffs' goods, and causing him pecuniary damage, is actionable. *Harman v. Delany*, 2 Strange, 898. In *Evans v. Harlow*, 5 Q. B. 624, it was held that special damage must be alleged, but it seems to have been assumed there that an action would lie for untrue and disparaging statements about the goods of a tradesman where special damage has been suffered. It must be conceded that these words are not libelous in the ordinary sense; but the case is similar to an action for slander of title, which, as is pointed out by *TINDAL, C. J.*, in *Malachy v. Soper*, 3 Bing. N. C., at page 383, is not "an action for words spoken or for a libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." *Young v. Macrae*, 3 Best & S. 264, 32 Law J. Q. B. 6, may be relied on by the defendants. But there all that was decided was that an action will not be maintainable against a man who is only alleged to have made untrue statements about the quality of his own goods. Here there is a distinct statement that the plaintiffs' manures are "altogether of a low quality."

Bowen, opposed.

The declaration does not allege that the defendants knew that the statements were false, and amounts to no more than a puff by one tradesman of his own goods. *Young v. Macrae*, 3 Best & S. 264, 32 Law J. Q. B. 6, is in point, for the *ratio decidendi* was that the mere comparison by

the defendant of his own goods with the plaintiff's, to the plaintiff's disadvantage, is not actionable. *Burnet v. Wells*, 12 Mod. 420. The cases of "slander of title" are not analogous to the present case, for in them the plaintiff's proprietary rights are affected. There is no authority which goes so far as to justify the proposition now contended for. In all the cases, either the words used amount to a personal imputation on the plaintiff personally or as a tradesman, or else they affect his property. Thus *Harman v. Delany*, 2 Strange, 898, was a slander of the plaintiff personally in the way of his trade.

[*POLLOCK, B.* This declaration alleges that the statement was made falsely and maliciously, and contriving to injure the plaintiffs.]

The mere telling of a falsehood, even though it be told maliciously, does not give a cause of action. *Miller v. David*, L. R. 9 C. P. 118.

BRAMWELL, B. In this case our judgment must be for the plaintiffs. The case may be shortly stated thus: The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published, of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this: that it was an article of low quality, and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libeling an article to say that it is an article of low quality, and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published, as it is said, of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says: "Meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises certain persons who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has

been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But, if actual malice is necessary,—which I do not think is the case,—the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods, to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young v. Macrae*, 3 Best & S. 264. When examined, that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue. It was only said, generally, that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action; but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim, *ubi jus ibi remedium*. It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by TINDAL, C. J., in his judgment in *Malachy v. Soper*, 3 Bing. N. C., at page 386. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyn's Digest, where it is said that an action lies when special damage is shown. Title, "Action on Case for Defamation," G 11.

The only question, therefore, that seems to arise, is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now, I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words, "contriving and intending to injure the plain-

tiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that, without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur, it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, (*Malachy v. Soper*, 3 Bing. N. C. 371; *Evans v. Harlow*, 5 Q. B. 624; and *Young v. Macrae*, 3 Best & S. 264,) I would only observe that in the two first-mentioned cases there is no allegation of special damage, while the last is distinguishable on the grounds mentioned by my Brother BRAMWELL. Moreover, there the chief justice in his judgment (3 Best & S., at page 271) supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

Judgment for plaintiffs.

(121 Mass. 393.)

RICE v. COOLIDGE *et al.*

(Supreme Judicial Court of Massachusetts.
December, 1, 1876.)

1. DEFAMATION—SUBORNATION OF PERJURY.

One who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party, is liable to an action by the person whose character is so defamed. That the perjured witness is protected by his personal privilege from a civil suit does not exempt the person who suborns him, they being joint tort-feasors. Nor is the novelty of such an action a valid objection thereto. *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; *Dunlap v. Glidden*, 31 Me. 435, distinguished.

2. SAME—PLEADING.

A declaration in such an action, each count of which alleges the procuring and suborning of several witnesses to testify falsely to defamatory matter concerning plaintiff, such different acts being all parts of one scheme, sets forth but one cause of action.

3. SAME—DAMAGES.

Special damages need not be alleged in such an action, the natural and necessary consequences of the acts charged being to injure plaintiff.

Demurrer to declaration, Suffolk county.

Action by Sarah M. Rice against John T. Coolidge and others. Defendants demurred to plaintiff's declaration.

E. D. Solier and *R. Olney*, for plaintiff. *S. Bartlett* and *D. Thaxter*, for the defendants.

MORTON, J. This is an action of tort. The principal question raised by the demurrer is whether the plaintiff's declaration states any legal cause of action. Each count alleges, in substance, that a proceeding for a divorce was pending in the courts of the state of Iowa between Joseph S. Coolidge and Mary L. Coolidge, in which the latter alleged that the said Joseph S. Coolidge had been guilty of adultery with the plaintiff; that the defendants conspired together and with the

said Mary L. Coolidge to procure and suborn witnesses to falsely testify in support of said charges of adultery; and that the defendants, in pursuance and execution of said conspiracy, did procure and suborn certain witnesses named, to testify in said divorce suit, and to falsely swear to criminal sexual intercourse between the plaintiff and said Joseph S. Coolidge, and between the plaintiff and other persons, and to various other acts and things which, if believed, would tend to bring disgrace and infamy upon the plaintiff. Three of the counts also allege that the defendants, in pursuance and execution of the conspiracy, published, or caused to be published, a printed pamphlet, in which the false testimony of such witnesses was repeated, and made the pretext for false and malicious charges upon the plaintiff's character and good name. The gist of the plaintiff's case is that the defendants have suborned witnesses to falsely swear to defamatory statements concerning her, and have done other connected acts in pursuance of a scheme or plan to defame her. The alleged conspiracy or combination is not one of the elements of the cause of action. That is not created by the conspiracy, but by the wrongful acts done by the defendants to the injury of the plaintiff. If the acts charged, when done by one alone, are not actionable, they are not made actionable by being done by several in pursuance of a conspiracy. *Wellington v. Small*, 3 Cush. 145; *Parker v. Huntington*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499. The question is presented, therefore, whether the plaintiff can maintain an action of tort, in the nature of the common-law action on the case, against the defendants for suborning witnesses to falsely swear to defamatory statements concerning the plaintiff in a suit in which neither of the parties to this suit was a party.

It requires no argument to show that the acts charged as done by the defendants, if proved, are a great wrong upon the plaintiff. It is a general rule of the common law that a man shall have a remedy for every injury. The plaintiff should have a remedy for the injury done to her by the defendants, unless there are some other rules of law, or some controlling considerations of public policy, which take the case out of this rule. The defendants contend that the witnesses who uttered the defamatory statements are protected from an action, because they were statements made in the course of judicial proceedings, and that, therefore, a person who procured and suborned them to make the statements is not liable to an action. It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*, 4 Hurl. & N. 569; *Revis v. Smith*, 18 C. B. 126; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, and cases cited; affirmed, L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1 C. P. Div. 540. The same doctrine is generally held in the American courts, with the

qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, 42 N. Y. 161; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Hoar v. Wood*, 3 Mete. (Mass.) 193. In the last-cited case, Chief Justice SHAW says: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry." We assume, therefore, for the purposes of this case, that the plaintiff cannot maintain an action against the witnesses in the suit in Iowa for their defamatory statements, though they were false. But it does not follow that she may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely. The reasons why the testimony of witnesses is privileged are that it is given upon compulsion, and not voluntarily; and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony. But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.

The argument that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tort-feasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tort-feasor from such suit. A similar argument was disregarded by the court in *Emery v. Hapgood*, 7 Gray, 55, where it was held that the defendant, who instigated and procured an officer to arrest the plaintiff upon a void warrant, was liable to an action of tort therefor, although the officer who served the warrant was protected from an action for reasons of public policy. The defendants rely upon the cases of *Bostwick v. Lewis*, 2 Day, 447, and *Smith v. Lewis*, 3 Johns. 157. But those cases turn upon a principle which does not apply in the case at bar. The facts in those cases were as follows: Lewis brought an action in Connecticut against several defendants, in which he prevailed. Afterwards Bostwick, one of the defendants in the original action, brought an action in Connecticut against Lewis, for suborning a witness in that action; and Smith, another of the defendants, brought a similar action in New York. It was held in each case that the action could not be maintained, because, in the language of Mr. Justice KENT, it was "an attempt

to overhaul the merits" of a former suit. The case of *Dunlap v. Glidden*, 31 Me. 435, is to the same effect. Although the parties to a former action cannot retry its merits, while a judgment therein is in force and unreversed, yet any person who was not a party to the action or in privity with a party may, in a collateral action, impeach the judgment and overhaul the merits of the former action. Those cases, therefore, are not decisive of the case at bar.

The defendants argue that an action of this nature ought not to be maintained, because the plaintiff therein might, by the testimony of a single witness, prove that a witness in another action had committed perjury. The rule of law that a man cannot be convicted of perjury upon the unaided testimony of one witness is a rule applicable only to criminal proceedings. The argument may go to show that the rule ought to be extended to civil cases in which perjury is charged against a witness, but it does not furnish a satisfactory reason why a plaintiff should be altogether deprived of a remedy for an injury inflicted upon him.

It is also urged, as an argument against the maintenance of this action, that it is a novelty. The fact that an action is without a precedent would call upon the court to consider with care the question whether it is justified by correct principles of law; but, if this is found, it is without weight. In answer to the same argument, Lord Chief Justice WILLES said: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*, Willes, 577. Upon a careful consideration of the case, we are of opinion that there are no rules of law and no reasons of public policy which deprive the plaintiff of her remedy for the wrong done her by the defendants by suborning witnesses to defame her character. There are several causes of demurrer assigned by the defendants which go to the form of the declaration, and which remain to be considered. It is contended that each of the counts is defective, because more than one cause of action is embraced therein. Each count alleges that the defendants procured and suborned several witnesses named, to falsely testify to defamatory matter concerning the plaintiff. The defendants argue that, if the witnesses were sued, the action against

each would be several, and not joint, and therefore, if the defendants are liable, the plaintiff must proceed by a separate action or a separate count for suborning each witness. But the plaintiff's cause of action is that the defendants, conspiring together, entered into a scheme to defame her, and carried out this scheme by a series of connected acts. If the defendants had suborned but one witness, the plaintiff might have had a cause of action; but, having suborned several, their different acts may be alleged to have been all parts of one scheme, designed and carried out to defame the plaintiff, and but one cause of action is set out. For the same reason the first, third, and fourth counts are not open to the objection of duplicity, because they allege that the defendants published a pamphlet entitled the "Argument of W. J. Knight, for Plaintiff." The publication of this pamphlet is set out as one of the acts done by the defendants in carrying out the conspiracy, and does not set out a libel as a separate cause of action.

Another ground of demurrer is that the declaration does not contain any allegation of damage sufficient to constitute a legal cause of action. The acts charged upon the defendants are such that the natural and necessary consequences of them are to injure the plaintiff. Under the general allegation of damage, she may recover damages for this injury, and no allegation of special damage is necessary to enable her to maintain her cause of action. Whether under the declaration she can recover for injury to her business we cannot consider in this stage of the case.

The only other ground of demurrer not considered is that the first three counts do not set out in full the words spoken by the suborned witnesses, or a copy of the printed "Argument of W. J. Knight, for Plaintiff." In an action like this, it is not necessary to set out the words spoken or written with the fullness required in actions of slander and libel, but it is sufficient to set out their substance. *Hood v. Palm*, 8 Pa. St. 237; *Haldeman v. Martin*, 10 Pa. St. 369. And we are inclined to the opinion that the first three counts of the plaintiff's declaration are sufficient in this respect. But we need not decide this point, as the fourth count sets out in full the testimony of the suborned witnesses and a copy of the printed pamphlet.

Demurrer overruled.

DEVENS and LORD, J.J., absent.

(See, also, *Lamb v. Stone*, 11 Pick. 526, given in full, supra; *Randlette v. Judkins*, 77 Me. 114; *Adams v. Marshall*, 135 Mass. 223, 233; *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. Rep. 63; judgment of WILLES, J., in *Bonomi v. Backhouse*, El. Bl. & El. 646; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Dalton v. Angus*, L. R. 6 App. Cas. 740.)

Illustration of the creation of legal rights by statute.

(78 N. Y. 310.)

WILLY V. MULLEDY.

(*Court of Appeals of New York*. Sept. 30, 1879.)

1. NEGLIGENCE—STATUTORY DUTY—FIRE-ESCAPES.

Laws N. Y. 1873, c. 863, tit. 13, § 36, which requires the owners of tenement-houses to provide them with fire-escapes, etc., imposes on such an owner an absolute duty for the benefit of his tenants, and he is liable for a breach of such duty causing damage to a tenant.

2. SAME—CONTRIBUTORY NEGLIGENCE.

That a tenant had taken rooms in such a house not provided with a fire-escape, and had occupied them for a few days previous to the fire causing the injury complained of by him, does not relieve the owner from liability therefor, where it is not shown that the tenant knew there was no fire-escape. He had the right to assume that the statutory duty had been performed, and owed no duty to the owner to make an examination to see whether it had been done.

3. SAME—EVIDENCE.

In such a case, on the question of the probability that an occupant of the house, whose death was caused by the fire, would have escaped had there been a fire-escape as required by the statute, it may be inferred from the construction of the house and the structure of fire-escapes where one would probably have been placed.

4. SAME—SAME.

And the facts that such person knew that there was a scuttle in the roof, had time after notice of the fire to reach it, and made efforts to escape, are sufficient to justify a jury in finding that such person tried to escape in that direction, and failed for want of a ladder to the scuttle, which the owner had not provided as required by the statute.

Appeal from city court of Brooklyn, general term.

Action by Joseph Willy, as administrator, etc., of his wife, against Patrick Mulledy, for damages for the death of plaintiff's wife, alleged to have been caused by neglect on the part of defendant. Defendant appeals from a judgment of the general term affirming a judgment for plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

Thomas E. Pearsall, for appellant. *A. Simis, Jr.*, for respondent.

EARL, J. This is an action to recover damages for the death of plaintiff's wife, alleged to have been caused by the fault of the defendant. Prior to the 1st day of November, 1877, the plaintiff hired of the defendant certain apartments in the rear of the third story of a tenement-house in the city of Brooklyn, and with his wife and infant child moved into them on that day. On the 5th day of the same month, in the day-time, a fire took place, originating in the lower story of the house, and plaintiff's wife and child were smothered to death.

It is claimed that the defendant was in fault because he had not constructed for the house a fire-escape, and because he had not placed in the house a ladder for access to the scuttle. Section 36, tit. 13, c. 863, Laws 1873, provides that every building in the city of Brooklyn shall have a scuttle or place of egress in the roof thereof of proper size; and "shall have ladders or stairways leading to the same; and all such scuttles

and stairways or ladders leading to the roof shall be kept in readiness for use at all times." It also provided that houses like that occupied by the plaintiff "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioners [of the department of fire and buildings;] and the owner or owners of any building upon which any fire-escapes may now or hereafter be erected shall keep the same in good repair, and well painted, and no person shall at any time place any incumbrance of any kind whatsoever upon said fire-escapes now erected, or that may hereafter be erected, in the city. Any person, after being notified by said commissioners, who shall neglect to place upon any such building the fire-escape herein provided for, shall forfeit the sum of \$500, and shall be deemed guilty of a misdemeanor." Under this statute the defendant was bound to provide this house with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval. No penalty is imposed for the simple omission to provide one. The penalty can be incurred only for the neglect to provide one after notification by the commissioners. Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley*, Torts, 654; *Hover v. Barkhoof*, 44 N. Y. 113; *Jetter v. Railroad Co.*, 2 Abb. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steel*, 3 El. & Bl. 402. In *Comyn's Digest*, "Action upon Statute," F, it is laid down as the rule that, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." There was no fire-escape for this house. But the claim is made on behalf of this defendant that he is not liable in this action, because the plaintiff and his wife knew, when they moved into the house and while they occupied the same, that there was no fire-escape, and hence that they voluntarily took the hazard of its absence. It is

undoubtedly true that the plaintiff could have stipulated against or have waived the performance of this duty imposed for his benefit, but this he did not do. There is no proof of any kind that it was the intention of the parties entering into their contract that he should take and occupy this house without a fire-escape. There is nothing to show that he knew there was no fire-escape there when he hired the apartments. It is not shown that his attention was in any way called to the matter or that he looked for one. Its absence could be discovered only by an examination outside of the house, and there is no evidence that he made such examination. He had the right to assume that the statutory duty had been performed. There is no proof that during his occupancy he discovered the absence of a fire-escape. He was there but three days, excluding the day upon which he moved in and the day upon which the fire occurred, and during that time it does not appear how much of the time he was in the house. There is certainly no evidence that he or his wife discovered that there was no fire-escape, or that their attention had been called to the matter. They owed no duty to the defendant to look and see whether there was one there or not. They had the right to rely upon its presence there as required by the statute. But suppose they did discover that there was no fire-escape at some time while there, after they moved in, does such discovery absolve the defendant from his duty? After making the discovery, they were not bound at once to leave the house and go into the street. They had a reasonable time to look for and move into other apartments; and by remaining for such reasonable time they waived nothing; and, if they did not choose to move out, they were entitled to a reasonable time to find the defendant and to call upon him to furnish the fire-escape. By remaining in the house for such reasonable time after discovery of the breach of duty on the part of the defendant, it could not be said as matter of law that they waived the performance thereof, or took upon themselves voluntarily the hazard of all the damages which they might sustain by the non-performance thereof. The duty rested upon the defendant not solely to have a fire-escape there when the plaintiff leased the premises, but it continued to rest upon him; and, before it could be held that the plaintiff absolved him in any way from this duty, the proof should be clear and satisfactory. Here, I hold, there was no proof whatever from which it could properly have been found that he did so absolve him.

But it was needful for the plaintiff to show, not only that there was this breach of duty, but that the death of plaintiff's wife was due to such breach; that is, that her life would have been saved if there had been a fire-escape there. It is reasonably certain that if the defendant had placed the fire-escape at the rear of the house, constructed as they were required to be, that the deceased would have seen it, and made her escape, as it would have been at one of the windows of the rear rooms which she occupied. But it is said that

the defendant was not bound to place the fire-escape at the rear of his house, but that he could have placed it in the front of his house, and that if he had placed it there she could not have escaped. It is probably true that she could not have escaped from the front of the house. But there is no proof where fire-escapes are usually constructed, nor whether the front or rear of this particular house would have been the more suitable place for the fire-escape. I think we may assume from the manner in which the front part of this house was constructed, and from the structure of fire-escapes, that it is most probable that it would have been placed on the rear of the house. We think upon the whole case there was enough to authorize the jury to find that the deceased would have escaped, if the defendant had discharged his duty as the law required.

Many of the observations already made apply to the ladder for the scuttle. The duty to furnish and keep such a ladder was imposed mainly for the benefit of the tenants. It was the intention of the statute that they should have two means of escape in the case of fire, one by the scuttle and another by the fire-escape. It was the duty of the defendant to provide a ladder, and then to use reasonable care to keep it there in readiness for use. The defendant had once provided a ladder for this scuttle, but for many months before this fire there had been none there. This the plaintiff and his wife did not know. They knew where the scuttle was, and they had the right to suppose that there was a ladder to reach it, as the law requires. Hence there was, or at least the jury had the right to find that there was, a breach of duty in this respect. But the claim is also made as to this that there was not sufficient evidence to authorize the jury to find that the breach of this duty had any connection with the death of plaintiff's wife; that her life would have been saved if the ladder had been there. We think there was. The evidence was not very satisfactory. It is true that much is left, from the necessity of the case, to the weighing of probabilities. But the jury could find that the deceased knew where the scuttle was; that she had time after notice of the fire to reach it; and that, as she was making efforts to escape, she probably tried to escape in that direction, and failed for want of the ladder. There was sufficient evidence, therefore, to authorize a verdict for the plaintiff, and we do not think the judgment should be reversed for other errors alleged.

There was no prejudicial error committed by the judge at the trial in receiving a copy of the printed specifications adopted by the commissioners, as to the material and manner of constructing fire-escapes. I think the evidence was wholly immaterial and harmless. The defendant was not charged with not building a fire-escape according to those specifications, but with wholly neglecting to build any. It was his duty to build one, and to apply to the commissioners for their directions and approval; and that they had adopted certain specifications of which he would have been informed if he had called upon

them is of no account and had no possible bearing upon the result of the trial. The court did charge in substance as requested that the defendant was not liable unless the evidence established the fact that the deceased made an effort to escape through the scuttle and was prevented from so doing by the absence of the ladder. It was not error to refuse to charge that if the plaintiff and his wife knew that there was no fire-escape then they could not re-

cover. There was no evidence from which the jury could properly find that they knew this when they hired the premises; and if they learned it afterwards for reasons above stated it would not necessarily follow that the plaintiff could not recover. Other allegations of error have been considered and are found to be without substance. The judgment must be affirmed with costs. All concur.

Judgment affirmed.

(See, also, *Baxter v. Doe*, 142 Mass. 558, 8 N. E. Rep. 415; *Pickering v. James*, L. R. 8 C. P. 489. For the limitations of the doctrine, see *Dudley v. Mayhew*, 3 N. Y. 9; *Grant v. Power Co.*, 14 R. I. 380; *Atkinson v. Water-Works Co.*, 2 Exch. Div. 441; *Gorris v. Scott*, L. R. 9 Exch. 125.)

Injuria sine damno gives a right of action.

(24 Wend. 188.)

DIXON v. CLOW.

(*Supreme Court of New York*. May, 1840.)

EASEMENTS — EXTENT OF RIGHT — NOMINAL DAMAGES.

One having an easement in land of another is liable for any injury to the land wantonly and unnecessarily done by him in the use of his privileges; and if he commits an unauthorized trespass on the land, the landowner may recover damages therefor, although he does not prove any particular amount of damages sustained by him.

Error from Cayuga common pleas.

Action of trespass *quare clausum fregit*, brought by Dixon against Clow, for breaking and entering plaintiff's close on several occasions, pulling down fences, etc. Defendant justified under an alleged grant for a ditch or water-course over plaintiff's land. It appeared that, in 1832, plaintiff had, by deed, in consideration of \$200, conveyed in fee to one Garlick, whose title was afterwards acquired by defendant, a piece of land, with the right to take water from a stream which ran through plaintiff's farm, for water-works to be constructed on the land conveyed; the water to be carried about half a mile over plaintiff's land, in a ditch, the course of which was specified, and which was to be not more than six feet wide at the bottom, and the grant being made subject to the rights of the state in a feeder to the Erie canal. There was evidence of acts of defendant, in entering on the land and constructing and repairing the ditch, which exceeded the authority conferred by the grant; but it was not shown that plaintiff had sustained any particular amount of damages. Plaintiff requested instructions to the jury, as follows: (1) That the grant only gave the right to enter on plaintiff's land for the purpose of digging and repairing the ditch; (2) that plaintiff had the right to include the ditch in fencing his fields, and that defendant had no right to remove the fences except when it was necessary to enter with teams, restoring the fences again when the repairs were made; (3) that defendant had no right to an open way along the water-course; (4) that the jury had a right to presume damages from the acts proved. The court refused so to charge, and instructed the jury that they doubted much whether the jury could find a verdict for plaintiff, when he

not only had not proved any sum as damages in consequence of the defendant's acts, but, upon inquiry by the court, his counsel had answered that he did not intend to offer any proof of the amount of damages. The court also charged, on the subject of the grant, that Garlick and his assigns had the full right to enter upon the premises described in the deed, along the course of the ditch, for constructing and repairing it, and that plaintiff had no right to build any fence that should run across the bank and the ditch, thereby obstructing the defendant from free access to the ditch, up and down it, for such purpose, that, if he had a right to build any fence, he might build a stone wall, and then defendant could not get to his ditch to repair it; and that defendant had a right to go along the line of his ditch without obstruction for the purpose aforesaid. Plaintiff excepted to the charge and to the refusal to charge as requested. The jury found a verdict for defendant, and plaintiff brought error.

J. Porter, for plaintiff in error. *A. Gould*, for defendant in error.

Bronson, J. The defendant has an easement in the plaintiff's land, and must be allowed to enjoy it in such a manner as will secure to him all the advantages contemplated by the grant. But he must so use his own privileges as not to do any unnecessary injury to the plaintiff. It is evident from the prior right of the state, the small amount of consideration in the deed, and the capacity of the ditch, so far as it has been constructed, that only a very small quantity of water was to be conducted over the plaintiff's land; and that the "water-works" or machinery to be erected on the defendant's lot were of no great extent or importance. I cannot think that a reasonable construction of this grant, which, in effect, gives the defendant an unobstructed right of way along the ditch, and compels the plaintiff either to throw open his fields, or to erect a fence on both sides of the canal for the whole distance of half a mile that it passes over his land. If the plaintiff may include the ditch in his fields, by extending across the banks a fence which can easily be removed in case of necessity, it does not follow that he can build a stone wall which will wholly exclude the defendant from his

water-course. The court held that the plaintiff had no right to build any fence that should run across the bank. I cannot see that this is a necessary conclusion of law on the facts detailed in the bill of exceptions. The case should, I think, have been submitted to the jury to say whether the acts of which the plaintiff complains were necessary to the enjoyment of the defendant's privileges, or whether he acted wantonly, and did an unnecessary injury to the plaintiff.

2. If the plaintiff succeeded in showing an unlawful entry upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at the least. It was not necessary for him to prove a sum, or that any particular amount of damages had been sustained; and the charge was in this respect improper. From the pleadings and the course of the trial, it is evident that the action was brought for the purpose of trying the extent of the defendant's right. It is suggested, and is probably true, that a suit was first commenced in a justice's court, where the defendant pleaded title, and thus made it necessary for the plaintiff to sue in the common pleas. But, however, that fact may be, every unauthorized entry upon the land of another is a trespass, and, whether the owner suffer much or little, he is entitled to a verdict for some damages.

Judgment reversed.

(3 Sumn. 189.)

WEBB V. PORTLAND MANUF'G CO.

(U. S. Circuit Court, D. Maine. May Term, 1838.)

1. VIOLATION OF RIGHT WITHOUT ACTUAL DAMAGE.

To sustain an action, where there is a clear violation of a right, it is not necessary to show actual damage; every such violation imports damage; and plaintiff is entitled to nominal damages, if no other be proved. *A fortiori* this doctrine applies when the act done is such that, by its repetition or continuance, it may become the foundation or evidence of an adverse right; and, in such a case, a court of equity will interpose by injunction to restrain such injurious act, when the remedy at law is inadequate to prevent and redress the mischief.

2. DIVERSION OF WATER-COURSE—INJUNCTION.

Plaintiff and defendants severally owned different mills and mill privileges at the same mill-dam. Defendants drew water for the supply of one of their mills from the head of the mill-pond, and afterwards returned the water into the stream below the dam. The water so withdrawn was much less than the amount to which defendants were entitled at the dam. *Held*, that plaintiff was entitled, not merely to his proportion of the water in the pond, but to his proportion of the whole stream at the dam, undivided and undiminished in its natural flow, and defendants should be restrained by injunction from the diversion of even a part thereof less than their proportion; and that it was no answer to plaintiff's bill therefor that defendants had improved the supply of water to the pond by a reservoir higher up the stream.

In equity. On bill for injunction.

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On the stream on which the mill was situated were two dams, the distance between which was about 40 or 50

rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam. A preliminary question, suggested by the court, was argued on the bill and answer.

C. S. Davis, for plaintiff. P. Mellen and Mr. Longfellow, for defendants.

STORY, J. The question which has been argued upon the suggestion of the court is of vital importance in the cause, and, if decided in favor of the plaintiff, it supercedes many of the inquiries to which our attention must otherwise be directed. It is on this account that we thought it proper to be argued separately from the general merits of the cause.

The argument for the defendants, then, presents two distinct questions. The first is whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions, the point will also incidentally arise whether it makes any difference that such drawing off of the water above can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. See Mayor of Lynn, etc., v. Mayor of London, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. *A fortiori* this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for

then it assumes the character, not merely of a violation of a right tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common-law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him. So long ago as the great case of *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion (page 14) Lord Holt says: "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. R. 955. And he cites many cases in support of his position. Among these is *Starling v. Turner*, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll, and it was determined that the action was maintainable for the refusal of the poll. Although it might have been that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from 23 Edw. III. 18, tit. "Defense," (it is a mistake in the MS., and should be 29 Edw. III. 18b; Fitz. Abr. tit. "Defense," pl. 5,) and 11 Hen. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due, yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in *Hunt v. Dowman*, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held that the action well lay, though no waste was committed and no actual damage done, for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring v. Finch*, 2 Lev. 250, where it was held

that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate, for whom he might have voted, might not have been chosen, and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case, for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See *Harman v. Tappenden*, 1 East, 555; *Drewe v. Coulton*, 1d. 563, note; *Kilham v. Ward*, 2 Mass. 236; *Lincoln v. Hapgood*, 11 Mass. 350; 2 Vin. Abr. "Action, Case," note c, pl. 3. In the case of *Ashby v. White*, as reported by Lord Raymond, (2 Ld. Raym. 953,) Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to *Mellor v. Spateman*, 1 Saund. 346a, note 2; *Wells v. Watling*, 2 W. Bl. 1233; and the case of the *Tunbridge Dippers*, (*Weller v. Baker*), 2 Wils. 414,—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, *ego assentior scævolaë*. The case of *Williams v. Morland*, 2 Barn. & C. 910, seems to have proceeded upon the ground that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle it is not now necessary to say. Some of the *dicta* in it have been subsequently impugned, and the general reasoning of the judges seems to admit that, if any right of the plaintiff had been violated, the action would have lain. The case of *Jackson v. Pesked*, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire whether there was not an overnicety in the application of the technical principles of pleading to that case, although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of *Young v. Spencer*, 10 Barn. & C. 145, turned also upon the point whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice BAYLEY) at the trial than with the decision of the court in granting a new

trial. But the court admitted that, if there was any injury to the reversionary right, the action would lie; and, although there might be no actual damage proved, yet, if anything done by the tenant would destroy the evidence of title, the action was maintainable. *A fortiori*, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, *Marzetti v. Williams*, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice TAUNTON on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hobson v. Todd*, 4 Term R. 71, 73, the court decided the case upon the very distinction, which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice GROSE, in *Pindar v. Wadsworth*, 2 East, 162. But the case of *Bower v. Hill*, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. The case of *Blanchard v. Baker*, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed for a moment that *Tyler v. Wilkinson*, 4 Mason, 397, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and *a fortiori* that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is

that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. See *Eden, Inj.*; 2 Story, Eq. Jur. c. 23, §§ 86-959; *Bolivar Manuf'g Co. v. Neponset Manuf'g Co.*, 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendants, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not, indeed, entertain a bill for an injunction in case of a mere trespass fully remediable at law. But, if it might occasion irreparable mischief or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 Story, Eq. Jur. §§ 926-928, and the cases there cited; *Jerome v. Ross*, 7 John. Ch. 315; *Van Bergen v. Van Bergen*, 3 John. Ch. 282; *Turnpike Road v. Miller*, 5 John. Ch. 101; *Gardner v. Village of Newburgh*, 2 John. Ch. 162.

Let us come, then, to the only remaining question in the cause, and that is whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in *Wright v. Howard*, 1 Sim. & S. 190, by Sir John LEACH, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. See, also, *Bealey v. Shaw*, 6 East, 208. "*Prima facie*," says that learned judge, "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in or-

der to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of *Tyler v. Wilkinson*, 4 Mason, 397, 400-402; and also in the case of *Blanchard v. Baker*, 8 Greenl. 253, 266. In the latter case the learned judge (Mr. Justice Weston) who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." The case of *Mason v. Hill*, 5 Barn. & Adol. 1, contains language of an exactly similar import, used by Lord DENMAN in delivering the opinion of the court. See, also, *Gardner v. Village of Newburgh*, 2 John. Ch. 162. Mr. Chancellor Kent has also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent, Comm., 3d Ed.; Lect. 42, p. 439;) and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books the doctrine is quaintly, though clearly, stated; for it is said that a water-course begins *ex jure nature*, and, having taken a certain course naturally, it cannot be [lawfully] diverted. *Aqua currit, et debet currere, ut currere solebat*. *Shury v. Piggot*, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being that the right of a riparian proprietor arises by mere operation of law as an incident to his ownership of the bank, and that of a mill-owner as an incident to his mill. *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 Barn. & Ald. 588; *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; *Blanchard v. Baker*, 8 Greenl. 253, 268; and *Tyler v. Wilkinson*, 4 Mason, 397, 400-405,—are fully in point. Mr. Chancellor Kent in his Commentaries relies on the same principles and fully supports them by a large survey of the authorities. 3 Kent Comm. (3d Ed.;) Lect. 52, pp. 441-445.

Now, if this be the law on this subject,

upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream, and may become the foundation of an adverse right in the defendants. In such a case actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period without damage, and without any pretense of right. In such a case, the wrong, if there be no sensible damage, and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case) be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water which is permanently maintained. The necessary result of lowering the head of water permanently would seem, therefore, to be a direct diminution of the value of the privileges; and, if so, to that extent it must be an actual damage.

Again, it is said that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use for their own mills on the lower dam half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill-pond? Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that, by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to; for, *pro tanto*, it will operate in the same manner; and, if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege attached to the mills of the plaintiff is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having

the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water-power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and, what alone would be decisive, it has the express sanction of the supreme court of Maine in the case of *Blanchard v. Baker*, 8 Greenl. 253, 270. The court there said, in reply to the suggestion that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, (before it passed the lands of another proprietor.) Besides, it was possible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water, by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording

a full supply in the stream in the driest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein, and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another, or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say that, in point of law, the defendants have any right to substitute for a present existing right of the plaintiff's, any other which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider. I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

(See, also, *Embrey v. Owen*, 6 Exch. 353; *Hastings v. Livermore*, 7 Gray, 194; *Chaffee v. Pease*, 10 Allen, 537; *Blodgett v. Stone*, 60 N. H. 167.)

Ex damno sine injuria non oritur actio.

(12 Mass. 220.)

THURSTON v. HANCOCK *et al.*

(Supreme Judicial Court of Massachusetts.
March Term, 1815.)

ADJOINING LAND-OWNERS—LATERAL SUPPORT.

Plaintiff purchased land on the summit of a hill having a rapid declivity on all sides, and built a house thereon, the foundation of which was within two feet of the boundary of the land on one side. Within ten years thereafter defendants, having purchased the land adjoining on that side, dug so deeply therein that, although they did not dig so far as the boundary, the earth fell away, by reason of the slope of the hill, so as to endanger plaintiff's house, and to compel him to remove therefrom and to take it down. *Held*, that plaintiff, having acquired no right by prescription, could not recover from defendants for the injury to his house, but that he might maintain an action for damages for the loss of or injury to the soil.

On report.

Action on the case by William Thurston against Ebenezer Hancock and others. The declaration alleged that plaintiff was seised in fee of a certain dwelling-house and land, with the appurtenances, which were in his possession and occupancy; that defendants wrongfully and injuriously took, dug, and carried away the earth, ground, and soil from the land next adjoining plaintiff's said dwelling-house and

land, to a great depth below the ancient surface of said next adjoining land, and below the foundation of plaintiff's said dwelling-house, and so near thereto that the ground, earth, and soil of plaintiff was undermined, and had fallen away from around his said dwelling-house, and from his land, so that the cellar walls thereof had been left exposed, by reason whereof said house was in great danger of being undermined and of falling down, and had been rendered wholly unsafe and insecure to dwell in, and plaintiff had been obliged to quit said house and leave it empty, and had been put to great trouble and expense, and had been and was still deprived of all benefit, use, and enjoyment thereof, to his damage \$20,000. Defendants pleaded not guilty. At the trial there was a verdict for defendants, which was to be set aside, and a new trial granted, if, in the opinion of the court, plaintiff was entitled to maintain the action, upon the facts reported by the judge before whom the case was tried, which were substantially as follows: Plaintiff, in the year 1802, purchased certain land on Beacon Hill, in the town of Boston, which was bounded westwardly by land then belonging to that town. Afterwards, in the year 1804, plaintiff erected a valuable brick dwelling-house thereon, the back of which was about two feet

from said western boundary of his land, and the foundation of which was about 15 feet below the ancient surface of the land. Plaintiff, with his family, occupied said house and land from the month of December, 1804, until they were obliged to remove therefrom as hereinafter mentioned. In the year 1811 defendants commenced digging and removing the gravel from the side of said hill. On January 27, 1811, plaintiff gave written notice to defendants that his house was endangered thereby, but they continued to dig and carry away the earth and gravel of the hill, until the commencement of this action. The only land belonging to defendants which adjoined said house and land of plaintiff was purchased by them of the town of Boston, and conveyed by deed dated August 6, 1811, and consisted of a lot about 100 feet square upon the top of said Beacon Hill, and a right to a highway 30 feet wide leading to it from Sumner street, which lot and highway were laid out by said town more than 60 years before, for the purpose of erecting a beacon, and had never been used for any other purpose, except the erection of a monument; the town having derived its title to said land from long-continued possession for said purpose. All these facts were known to defendants before they purchased said land of the town. Said land adjoined plaintiff's house and land on the western side, and, at the time of suing out plaintiff's writ, defendants' said digging and removal of earth had approached on the surface within 5 or 6 feet of plaintiff's house on the western side thereof, and in some places the earth had fallen from the walls thereof by reason of said digging and removal. Defendants had dug and carried away the earth near the north-westerly corner of plaintiff's house to the depth of 45 feet, and on the western side thereof to the depth of 30 feet, below the natural surface of their own as well as of plaintiff's land; the earth so dug and removed by them being upon and from their land next adjoining plaintiff's land. By reason of such digging and removing of the earth to said depth below the ancient surface, part of plaintiff's earth and soil, on the surface of his said land, had fallen away and slid down defendants' land; and the foundation of plaintiff's house was rendered insecure, and it became and was at the time of commencing the action unsafe and dangerous to dwell in said house; and plaintiff was obliged to quit and abandon said house previous to commencing this action, and afterwards to take it down in order to save the materials thereof.

Mr. Otis and Mr. Prescott, for plaintiff. The Solicitor General and Mr. Aylwin, for defendants.

PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but, after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action. The

plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804 he erected a brick dwelling-house and out-houses on this lot; and laid his foundation on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession, for more than 60 years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and in the same year commenced leveling the hill, by digging and carrying away the gravel,—they not actually digging up to the line of division between them and the plaintiff, but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house as to make it prudent and necessary, in the opinions of skillful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages in case of any loss.

The manner in which the town of Boston acquired a title to the land, or the particular use to which it was appropriated, can have no influence upon the question, as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied. It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property, or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas*. Thus no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather, or to unwholesome smells. But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is that by the ancient common law no man could maintain an action against the owner of an adjoining tract of land for interrupting the passage of the light or the air to a tenement, unless the tenement thus affected was ancient; so that the plaintiff could prescribe for the privilege of which he had been deprived, upon the common motion of prescription, that

there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued. Now, in such case of a grant presumed, it shall, for the purposes of justice, be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has, so as to control him in the use of his own property in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle which gives one neighbor an action against another for making the same use of his property which he has made of his own. And it is a reasonable principle, for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of 60 years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted or consented to or acquiesced in the use of the privilege.

It is true that of late years the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than 60 years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title-deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription. The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, 10 years before the commencement of his suit. So that if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case where less than 20 years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land; and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience. This seems to be the result of the cases anciently settled in England upon the subject of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff in support of this action generally go to establish only the general principle that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon this subject; for, although it is there laid down that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them, and that the person erecting them shall restore things to their former state, and repair the damages,—from whence, probably, the common-law remedy of abating a nuisance as well as a recovery of damages,—yet this is subsequently explained and qualified in another part of the same chapter, where it is said that if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title, or possession, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously, and the damages shall be considered as casualties for which he is not answerable. The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages if by such use he should injure a building previously erected, is that of *Slingsby v. Barnard*, cited from 1 Rolle, 430. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seised of a dwelling-house *nuper edificatus*, and that Barnard was seised of a house next adjoining; and that Barnard, and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house that they undermined the same, and one-half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration. The report of this case is very short and unsatisfactory, it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report without denying principles which seem to have been deliberately laid down in other books equally respectable as authorities. Thus

¹ Domat, 309. 408; Fitzh. Nat. Brev. 183; Aldred's Case, 9 Coke, 59; Jones v. Powell, Palmer, 536; 1 Roll. Abr. 140; Id. 430; *Slingsby v. Barnard*, 1 Rolle, 430; 2 Roll. Abr. 565; 2 Saund. 697; Co. Litt. 56b; Rex v. White 1 Burrows, 337; Stone v. Cartwright, 6 Term R. 411; Proprietors, etc., v. Bradley, 7 East, 368; Bush v. Steinman, 1 Bos. & P. 405; Leader v. Moxton, 3 Wils. 461.

in *Palmer v. Fleshees*, Sid. 167, upon a special verdict the case was thus: A., having a certain quantity of land, erected a new house upon part of it, and leased the house to B., and the residue of the land to C., who put logs and other things upon the land adjoining said house, so that the windows were darkened, etc. It was holden that B. could maintain case against C. for this injury. But the reason seems to be that C. took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was, however, decided in the same case that if one seised of land lease 40 feet of it to A. to build upon, and another 40 feet to B. to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in *Pigott & Shewry's case*, (W. Jones, 145; Palm. 444; Latch, 153; Noy, 84; 3 Bulst. 339; Poph. 166,) for each one may make what advantage he can of his own. The principle of this decision is that both parties came to the land with equal rights in point of time and title, and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident, and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated as resolved by the court that, if a stranger have the land adjoining to a new house, he may build new houses, etc., upon his land, and the other shall be without remedy when the lights are darkened; otherwise when the house first built was an ancient one. In *Roll. Abr. 565, A.*, seised in fee of copyhold estate next adjoining land of B., erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B., and B. afterwards digs his land so near the house of A., but on no part of his land, that the foundation of the house, and even the house itself, falls; yet no action lies for A. against B., because it was the folly of A. that he built his house so near to the land of B. For by his own act he shall not hinder B. from the best use of his own land that he can; and after verdict judgment was arrested. The reporter adds, however, that it seems that a man who has land next adjoining my land cannot dig his land so near mine as to cause mine to slide into the pit, and, if an action be brought for this, it will lie. Although, at first view, the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor if he digs too near his line; and, if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor; for in so placing the house the neighbor was in fault, and ought to have taken better care of his interest. If this be

the law, the case before us is settled by it; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be. The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew, also, the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril, for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his 10-years occupation to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air, because he should have known that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is in fact *damnum absque injuria*. By the authority above cited, however, it would appear that for the loss of or injury to the soil merely, his action may be maintained. The defendants should have anticipated the consequence of digging so near the line, and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

(40 N. J. Eq. 447, 3 Atl. Rep. 168.)

OCEAN GROVE CAMP MEETING ASS'N v.
COMMISSIONERS OF ASBURY PARK.

(Court of Chancery of New Jersey. Oct. Term, 1885.)

SUBTERRANEAN WATERS—DIVERSION.

Complainants, by boring for water, on land owned by them, to a depth of about 400 feet, had obtained a flow of 50 gallons per minute. Subsequently defendants, needing water for use on their land, three-eighths of a mile from complainants', and having failed to obtain a supply by boring thereon, sank a shaft on land of third parties, by permission of the latter, within 500 feet of complainants' well, to nearly the same depth, and thereby secured a flow of 30 gallons a minute, and thereupon the supply from complainants' well fell to 30 gallons per minute. *Held* that, in the absence of proof that the water was taken from a stream, it must be presumed to be the property of the owner of the fee; and complainants could not maintain an action to compel defendants to close the well so opened by the latter, or to restrain them from sinking other wells nearer complainants' well.

On order to show cause why injunction should not issue.

R. Ten Broeck Stout, for complainants.
D. Harvey, Jr., and J. F. Hawkins, for defendants.

BIRD, V. C. More than 15 years ago the complainants purchased a large tract of

land fronting upon the ocean, chiefly for the purposes of a summer resort to exercise the right of worship. The enterprise has so grown that in winter it has a population of about 5,000, and in summer of 10,000 or 15,000. The authorities soon discovered that, to preserve the good health of the residents and visitors, it was absolutely necessary to improve their water-supply and sewerage system. To do this they bored for water, and at the depth of over 400 feet struck water which gave them a flow of 50 gallons per minute at an elevation above the surface of 28 feet. This they carried into the city by means of pipes, and supplied therewith about 70 hotels and cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed. The Commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north of and adjacent to the tract owned by Ocean Grove. Under their management, this, too, has become a famous seaside resort. Its population is equal to, if not greater at all times than, that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over 400 feet without satisfactory success. One shaft yielded about 4 gallons to the minute, and another, which yielded the most, only 9. All of the wells were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce 15 gallons each per minute, being as much in quantity as they procure from the well which is complained of. Failing in their efforts upon their own premises, they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within 500 feet of the complainants' well. This bore extended to the depth of 416 feet, within 8 feet of the depth of complainants' well. At this depth they secured a flow of water at the rate of 30 gallons per minute, and the supply from the complainants' well was almost immediately decreased from 50 gallons to 30 per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove. The Asbury Park authorities propose to sink other wells still nearer the well of complainants.

This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation. In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or under-ground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procuring water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use. Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainants. *Ang. Water-Courses*, §§ 109-114, inclusive; *Gould, Waters*, § 280; *Ballard v. Tomlinson*, 26 Ch. Div. 194; *Chasemore v. Richards*, 7 H. L. Cas. 349, 5 Hurl. & N. 982; *Acton v. Blundell*, 12 Mees. & W. 324; *Chase v. Silverstone*, 62 Me. 175; *Roath v. Driscoll*, 20 Conn. 533; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Goodale v. Tuttle*, 29 N. Y. 459; *Wheatley v. Raugh*, 25 Pa. St. 528; *Frazier v. Brown*, 12 Ohio St. 294.

The courts all proceed upon the ground that waters thus used and diverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and consequently are the absolute property of the owner of the fee, as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure. These, when collected, interfere with his progress, and he may remove them, although the spring or well of the land-owner below be diminished or destroyed. So the owner or owners of a bog, marsh, or meadow may sink wells therein, and carry off the waters collected in them, to the use or enjoyment of a distant village or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles, there can be no doubt but that every lot-owner in Ocean Grove or Asbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil. In the case be-

fore me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are.

The presumption is the other way. It seems to be my very plain duty to discharge the order to show cause, with costs.

(See, also, *Lybe's Appeal*, 103 Pa. St. 626; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. Rep. 453; *Gilmore v. Driscoll*, 122 Mass. 199; *Radeliff v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. Rep. 443; *Tunstall v. Christian*, 80 Va. 1.)

In some classes of cases, there must be damage sustained in order that there may be a cause of action for tort.

(5 Best & S. 384.)

ROBERTS *et ux.* v. ROBERTS.

(*Court of Queen's Bench.* June 3, 1864.)

SLANDER—SPECIAL DAMAGE.

In an action by husband and wife for slander of the latter, the declaration alleged that the wife was a member of a certain religious sect and of one of the societies of such sect; that the sect and its societies, and the members thereof, were subject to rules and regulations, by which a member of one such society could not become a member of another society in the sect unless the leaders or elders of the first society certified that such member was morally and otherwise fit to be a member; and that by reason of words spoken by defendant of the wife, imputing to her immoral conduct, she was not allowed to continue to be a member of the society, and the leaders or elders thereof refused to certify that she was morally or otherwise fit to be a member of the sect, or of any society of the same, and she was not allowed to become a member of a certain society thereof, and was prevented from attending religious worship, and was injured in her good name and reputation, and became sick and greatly distressed in body and mind. *Held*, that no special damage was alleged sufficient to make the words actionable.

Demurrer to declaration.

Action by Robert Roberts and Margaret Roberts, his wife, for an alleged slander on the latter.

The declaration stated that the plaintiff Margaret was a member of a sect of Protestant dissenters, to-wit, Calvinistic Methodists, and was a member of a private society and congregation of that sect held at Denbigh, in North Wales, and the sect, and the different societies of it, were subject to certain rules and regulations, and the different members of the sect and the societies were respectively subject to those rules and regulations, and under the control and authority of the several respective societies, and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the different societies and congregations of the sect; and by those rules and regulations a member of one society in the sect could not become a member of another society in the sect unless the leaders or elders of the first-mentioned society certified that the said member was morally and otherwise fit to be a member of such sect, and of a society of the same; and the defendant, being a member of the sect, and of the society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her

as a member of such sect and society, and in the presence of the leaders or elders and other members of the society and congregation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following, in the Welsh language, (setting them out;) which words, being translated into the English language, have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published; that is to say, "You [meaning the plaintiff Robert Roberts] have got for a wife [meaning the plaintiff Margaret] as great a whore as any in the town of Liverpool. I had connection with her several times, the last time a night or two before she left for Liverpool;" meaning thereby that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become, or be a member of any society and congregation of the sect aforesaid; and by means of the premises the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the society and congregation aforesaid, and was turned out of the same, and the leaders or elders of the society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the sect or of any society or congregation of the same; and the plaintiff Margaret, being desirous of becoming a member of a society and congregation of the sect in Liverpool, was not allowed or permitted or able to become a member of the society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill, and greatly distressed in body and mind. Averment, that, by means of the premises, the plaintiff Robert Roberts had been put to and incurred great expenses in and about nursing the plaintiff Margaret, and endeavoring to get her cured from her sickness, illness, and distress of mind, and had sustained divers other injuries and damages; and the plaintiffs claimed £500.

McIntyre, for defendant.

The words in the declaration are not actionable without special damage. *Allsop v. Allsop*, 5 Hurl. & N. 534; *Lynch v. Knight*, 9 H. L. Cas. 577. And no special damage is alleged sufficient to render the words actionable by reason of such damage. The allegation that the plaintiff Margaret was injured in her good name and reputation, and became sick and ill

and distressed in body and mind, is not sufficient. *Allsop v. Allsop*, 5 Hurl. & N. 534. [Crompton Hutton, for plaintiffs: That is admitted.] The remaining head of special damage, that she was not allowed to continue a member of the society and congregation of Calvinistic Methodists, and was prevented from attending religious worship, is not temporal or pecuniary damage. The first part amounts to no more than that she was excluded from associating with particular persons. It is not alleged that she was a teacher in the society and congregation, or that she derived any special advantage from being a member of it. As to the other part, the elders could not prevent her from attending the chapel. In *Bateman v. Lyall*, 7 C. B. (N. S.) 638, there was an allegation of loss of customers by the husband in his business in consequence of the words spoken of his wife by the female defendant.

Crompton Hutton, for plaintiffs.

Sufficient special damage to the wife is shown for which the husband may maintain this action. If the special damage must be pecuniary, an action for slander of a wife never could be maintained, as the damage would be to the husband, not to the wife. An action will lie for words spoken by which a woman has lost her marriage. *Davis v. Gardiner*, 4 Coke, 16b. [BLACKBURN, J.: Marriage has always been considered a valuable consideration.] In *Lynch v. Knight*, 9 H. L. Cas. 577, the special damage relied upon was not the natural and probable consequence of the words spoken; but it was the opinion of Lord CAMPBELL, at page 589, that loss of *consortium* or conjugal society would give a cause of action to a wife as well as to a husband. [BLACKBURN, J.: Lord CRANWORTH, page 595, was strongly inclined to agree in that, though Lord WENSLEYDALE was of a different opinion. CROMPTON, J.: The loss of *consortium* of the wife has always been considered a temporal damage in an action by the husband for criminal conversation.] In the present case there is a loss of something more than *consortium vicinorum*. The wife was a member of a religious society and congregation, and as such entitled to a seat in the chapel belonging to that society and congregation; but, in consequence of the words spoken by the defendant, she was turned out of it. [McIntyre: It is not alleged that she was entitled to a seat in the chapel without payment. BLACKBURN, J.: Unless she has been deprived of something of pecuniary value, it is difficult to distinguish the present case from that of slander of a chaste unmarried woman.] The court will not extend that doctrine. Value is attached to social advantages and position, of which the court will take notice. The wife had a *status* as member of the society and congregation, which she has lost. [COCKBURN, C. J.: She had no other benefit from it except attending a congregational place of worship, and she may get that benefit whether she attends as a member of the society or not.] A right to a seat in a church or chapel is an advantage of which the law will take notice.

The reason why the loss of *consortium vicinorum* is not sufficient special damage is that the most capricious motives may deprive a person of it. Com. Dig., "Action upon the Case for Defamation," D. 30.

COCKBURN, C. J. No cause of action is shown in this declaration, as it does not allege special damage sufficient to make the words spoken of the female plaintiff actionable. It is admitted that the loss of *consortium vicinorum* is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as loss of seat in the chapel, or of the opportunity of attending divine worship there. If, by reason of the words spoken, the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If, upon further inquiry, anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration.

CROMPTON, J. On the last observation made by the lord chief justice I wish to remark that the amendment should be immediate, so that the cause may be tried at the coming assizes. I agree that the present case falls within the rule that the loss of *consortium vicinorum* is not sufficient special damage. Here is no loss of a temporal nature; or, if there be any, it is merely nominal. Though I wish the law were different in the case of words affecting the chastity of women, yet the line must be drawn somewhere between words which are and words which are not actionable; and, if we held that the action for slander could be supported by the allegation that the plaintiff had suffered some nominal special damage, we must apply that doctrine to all kinds of less disparaging words, and should thereby encourage actions which ought not to be brought, as for saying that a person did some disreputable act, though not essentially criminal. My only doubt is whether the being prevented from attending religious worship is sufficient special damage; but, if it was conducted in a chapel, the female plaintiff could not be prevented from attending and occupying a seat there, especially if she paid for her seat. We do not, however, know how that is; it is not

even stated that this society had a chapel. The special damage alleged is of a nominal nature, and therefore our judgment must be for the defendant.

BLACKBURN, J. The law upon the subject of disparaging words spoken of other persons is not in a satisfactory state. For words written an action is maintainable, though possibly not more than one farthing damages could be obtained; whereas for words spoken imputing unchastity to a woman no action can be maintained unless special damage is shown, for which purpose there must be material injury to the interest of the person slandered. What is here alleged is no more than loss of the *consortium vicinorum*.

Judgment for the defendant.

(The rule of the common law, as declared in this case, has been changed by statute in many states of this country.)

(L. R. 1 C. P. 561.)

SMITH v. THACKERAH *et al.*

(Court of Common Pleas. May 25, 1866.)

ADJOINING LAND-OWNERS—LATERAL SUPPORT.

Defendants dug a well on their own land, near land of plaintiff, thereby causing his land to sink, so that a building recently erected by him thereon was injured; but there would have been no appreciable damage to him if the building had not been on the land. *Held*, that plaintiff had no right of action.

Rule to show cause.

Action by Smith against Thackerah and another. The declaration alleged that the plaintiff was possessed of certain land, and the land received lateral support from certain land adjoining thereto; and the defendants dug and made on this adjoining land an excavation or well near to the land of the plaintiff, and the defendants thereby, and for want of keeping and continuing the sides of the well shored up, or otherwise preventing the consequences hereinafter mentioned, wrongfully deprived the land of the plaintiff of its support, whereby the land of the plaintiff sank and gave way, and divers walls, buildings, and premises of the plaintiff on the land sank and were damaged, whereby the plaintiff was put to great expense, etc. Pleas, not guilty and not possessed. At the trial before ERLE, C. J., it was proved that the plaintiff was possessed of a piece of land on which a building had been recently erected, and that the defendants, who were neighboring land-owners, dug a well on their own land near to that of the plaintiff, and afterwards filled up the well with such loose earth that the ground round it sank, and the plaintiff's building was injured, causing damage to the amount of £15. The jury found, in answer to questions by the chief justice, that the land of the plaintiff would have sunk if there had been no building on it, and that some particles of sand from it would have fallen onto the defendants' property, but that the plaintiff would have suffered no appreciable damage. A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for such sum, under £15, as the court should direct, on the ground

that the facts proved at the trial entitled the plaintiff to a verdict without proof of any pecuniary damage.

Robinson, Serj., having obtained a rule *nisi* pursuant to the leave reserved, Joyce showed cause. If the buildings had not been on the land the damage would have been inappreciable, and there would have been no right of action. The right of action does not arise when the adjacent ground is removed, but only when the injury happens to the plaintiff's land. *Bonomi v. Backhouse*, El. Bl. & El. 622, 646, 27 Law J. Q. B. 378, 28 Law J. Q. B. 378; in the house of lords, 9 H. L. Cas. 503, 34 Law J. Q. B. 181.

Robinson, Serj., and *Joseph Sharpe*, in support of the rule.

The defendants had no right to cause the plaintiff's land to sink, and, the jury having found that the land would have sunk even if the plaintiff had not erected any buildings on it, the plaintiff is, at least, entitled to nominal damages. *Ashby v. White*, 1 Smith Lead. Cas. (5th Ed.) 216; *Brown v. Robins*, 4 Hurl. & N. 186, 28 Law J. Exch. 250,—shows that he is entitled to recover compensation for the fall of the house, which was an injury naturally resulting from the defendants' wrongful act.

ERLE, C. J. I am of opinion that this rule should be discharged. There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land, or, as in the case of *Ashby v. White*, 1 Smith Lead. Cas. (5th Ed.) 216, interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and, since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house, the noise of which may be inconvenient; but, unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act. In the case of *Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 35 Law J. Q. B. 66, in which the defendant had set up some chemical works, the house of lords held that, if the noxious vapors did not cause material damage to the plaintiff, he had no cause of action. In the present case, the digging the well and filling it up again were in themselves perfectly lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action.

BYLES, J. I am of the same opinion. In actions for a trespass, the trespass itself is a sufficient cause of action. But in actions for indirect injuries like the present, the judgment of the house of lords in *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 34 Law J. Q. B. 181, shows that there is no cause of action if there be no damage, and

I cannot distinguish between no appreciable damage to the land in its natural state and no damage at all.

MONTAGUE SMITH, J. I am of the same opinion. The mere subsidence of the surface of the soil is not necessarily an injury, and we are bound by the verdict of the jury, who found that in fact no appreciable damage would have occurred if these new buildings had not been on the land.

Rule discharged.

(6 Johns. 151.)

UPTON v. VAIL.

(*Supreme Court of New York*. Albany. Aug., 1810.)

FRAUD—REPRESENTATIONS AS TO CREDIT OF THIRD PERSON—STATUTE OF FRAUDS.

An action may be maintained for false representations by defendant to plaintiff as to the solvency of a third person, whereby plaintiff was induced to give credit to the latter, and lost his debt. Fraud or deceit, together with damage, is a good cause of action. And such an action will lie, though the representation was merely oral; the case is not within the statute of frauds.

Certiorari to review a judgment of a justice's court.

Action on the case brought by Vail against Upton for alleged false and deceitful representations by defendant, Upton, that one Brown was a man of property, whereby plaintiff was induced to give credit to Brown, and afterwards lost the debt. At the trial before a justice of the peace it appeared that defendant, Upton, had a judgment bond against Brown, dated March 5, 1808, for \$550. On March 10, 1808, defendant and Brown went to plaintiff, and Brown applied to plaintiff for certain goods on credit; and, on plaintiff inquiring of defendant as to Brown's solvency, defendant said he was good, as good as any man in the country, for the amount of the price of the goods. Plaintiff thereupon gave Brown the goods on credit, and took his note therefor, payable on the 1st day of the following October. On March 25, 1808, defendant caused an execution to be issued on his judgment, which was levied on all the property of Brown, including the goods so obtained from plaintiff; and thereafter said goods were sold, under the execution with the other property levied on, as the property of Brown, before the note given by Brown had become due. The justice rendered judgment for plaintiff. Defendant brought *certiorari* to review the judgment. The cause was submitted without argument.

KENT, C. J. Deceit, in the recommendation of Brown, was the gist of this action. It was a conclusion which the justice was to draw from the facts, and I think the facts did warrant that conclusion. There is no cause to disturb the judgment below, on the ground that it is not supported by proof. The judgment of the justice was here a substitute for the verdict of a jury, and the facts would well have justified a jury to have drawn the inference of a premeditated fraud. But one of the points stated on the part of the plaintiff is that this action will not lie at all without showing some note or memoran-

dum in writing to charge the party, and this objection was made at the trial below. We have never expressly decided in this court that the action would lie. In *Ward v. Center*, 3 Johns. 271, the question was incidentally raised, but no opinion expressed by the court, because the motion in that case was for a new trial, and not in arrest of judgment. The case of *Pasley v. Freeman*, 3 Term R. 51, (decided in the king's bench so late as the year 1789,) is the first direct authority in the English courts in support of the action. I have carefully examined the reasoning of the judges in that case, and in the subsequent cases, which go to question or support the soundness of that decision, and I profess my approbation of the doctrine on which it was decided. The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence. The only plausible objection to it is that in its application to this case it comes within the mischiefs which gave rise to the statute of frauds, and that, therefore, the representation ought to be in writing. But this, I apprehend, is an objection arising from policy and expediency; for it is certain that the statute of frauds, as it now stands, has nothing to do with the case. The case of *Pasley v. Freeman* has received a decided sanction, by a succession of learned judges, in the several courts of Westminster Hall; and I observe that the action is sustained without contradiction in the courts in Connecticut. *Eyre v. Dunsford*, 1 East, 315; *Haycraft v. Creasy*, 2 East, 92; *Tapp v. Lee*, 3 Bos. & P. 367; *Hamar v. Alexander*, 2 Bos. & P. 241; *Thompson v. Bond*, 1 Camp. 4; *Richardson v. Smith*, Id. 277; *Wise v. Wilcox*, 1 Day, 22. In one of the cases, Sir JAMES MANSFIELD says: "I am far from wishing to sustain an action simply upon misrepresentation, but there never was a time in the English law where an action might not have been maintained against the defendant for this gross fraud." Lord ELDON has, indeed, expressed his dissatisfaction with the case of *Pasley v. Freeman*, and he thought that the statute of frauds and perjuries ought to be applied to the case. *Evans v. Bicknell*, 6 Ves. 186. He is, undoubtedly, a very respectable authority; but, as far as mere authority goes, the preponderance is vastly on the other side. The courts of law have been uniformly against him, and even his successor, Lord ERSKINE, has declared himself in the strongest terms in favor of the suit. "As to the danger from a single witness," he observed, "is not one sufficient for conviction of a capital crime? That objection goes to the very root of the law, which is uniform in principle and practice, with the single exception of the case of perjury, as there is oath against oath. The case of *Pasley v. Freeman*, therefore, stands upon the clearest principles of jurisprudence, and has no connection with the statute of frauds, which applies where

one man undertakes for the debt of another." *Clifford v. Brooke*, 13 Ves. 133. But, independent of the English cases, I place my opinion upon the broad doctrine that fraud and damage, coupled together, will sustain an action. This is a principle of universal law, and I consider it as deserving of particular notice, and, in a question depending upon general principle, as adding no inconsiderable weight to the accumulation of authority, that the same doctrine is laid down by Pothier. *Traité du Contrat de Mandat*, art. 21. It is drawn by him from the text of the civil law, where it is supported by the sanction of Ulpian. Dig. 50, 17, 47. *Consilii non fraudulenti nulla obligatio est, caterum si dolus et calliditas intercessit, de dolo actio competit*. "If," says Pothier, "you had only recommended Peter to his

creditor as honest and able to pay, this was but advice, and not any obligation; and if Peter was, at the time, insolvent, you are not bound to indemnify the creditor for the sum which he loaned to Peter by means of your advice, and which he has lost. *Nemo ex consilio obligatur*. The rule is the same if the advice was given rashly and indiscreetly, without being duly informed of the circumstances of Peter, provided it was sincerely given. *Liberum est cuique apud se explorare an expedit sibi consilium*. But if the recommendation was made in bad faith, and with knowledge that Peter was insolvent, in this case you are bound to indemnify the creditor." The court are accordingly of opinion that the judgment below must be affirmed.

Judgment affirmed.

(See, also, *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. Rep. 489; *Tryon v. Whitmarsh*, 1 Metc. [Mass.] 1; *Benton v. Pratt*, 2 Wend. 385; *Taylor v. Guest*, 53 N. Y. 262; *Backhouse v. Bonomi*, 9 H. L. Cas. 503.)

In actions of tort, damages may be awarded for the proximate, but not for the remote, consequences of the tortious act—Nature of this distinction.

(3 Q. B. Div. 327.,

CLARK v. CHAMBERS.

(*Queen's Bench Division*. April 15, 1878.)

NEGLIGENCE — PROXIMATE OR REMOTE CONSEQUENCES.

Land used by defendant as a place for athletic sports abutted on a private road, consisting of a carriage-way and footway, and leading also to premises of others. To prevent persons driving vehicles up to the fence surrounding his premises, and overlooking the sports, defendant placed a barrier across the road, but left in the middle of the carriage-way a space through which vehicles could pass, which was closed by a pole at times when the sports were going on. A part of the barrier, armed with spikes, was removed from the carriage-way by some person other than defendant, without his authority, and was placed in an upright position across the footpath. Plaintiff, passing along the road at night, from one of the houses to which it led, passed safely, feeling his way, through the opening in the middle of the barrier, and, being wholly unaware that there was any obstruction on the footpath, as it was much too dark to see, turned towards it, and his eye came into contact with one of the spikes, and was injured. In an action by him against defendant therefor, it was admitted that the erection of the barrier by defendant was wrongful, and that plaintiff was lawfully using the road; and the jury found that the use of that part of the barrier armed with spikes was dangerous to persons using the road. *Held*, that defendant was liable for the injury so occasioned to plaintiff, notwithstanding the fact that the immediate cause of the accident was the act of another, in removing the dangerous instrument from the carriage-way, where defendant had placed it, to the footpath.

Reserved case.

Action by Clark against Chambers for personal injuries to plaintiff, alleged to have been caused by defendant's negligence. At the trial, before the lord chief justice, the case was reversed for further consideration.

Argued before COCKBURN, C. J., and MANISTY, J.

Mr. Willis, Q. C., and Mr. Glyn, for plaintiff. Mr. Hannen, for defendant.

COCKBURN, C. J. This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time. The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his; it consists of a carriage-road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises. The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement. His customers, finding themselves annoyed by persons coming along the road in question in carts and vehicles, and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways next to the footpath; then two wooden barriers armed with spikes, commonly called "*chevaux-de-frise*;" then there was left an open space through which a vehicle could pass; then came another large hurdle, set up lengthways, which blocked up the rest of the road. At ordinary times, the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But, at the times when the sports were going on, a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked. Among

the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred, the plaintiff, who occupied premises in the immediate neighborhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but, being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety; but on his return, later in the evening, the plaintiff was not equally fortunate. It appears that, in the course of that day or the day previous, some one had removed one of the *chevaux-de-frise* hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the center of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned onto the latter, intending to walk along it the rest of the way. He had advanced only two or three steps, when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the *chevaux-de-frise* hurdle had been thus removed, but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the *chevaux-de-frise* in the road was dangerous to the safety of persons using it. The ground of defense in point of law taken at the trial and on the argument on the rule was that, although, if the injury had resulted from the use of the *chevaux-de-frise* hurdle, as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that, as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences.

Numerous authorities were cited in support of this position. The first is the case of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892. In that case the defendant threw a

lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which, in self-defense, took it up and threw it across the market-house. It fell upon another standing, the owner of which, in self-defense, took it up and threw it to another part of the market-house, and in its course it struck the plaintiff, and exploded, and put out his eye. The defendant was held liable, although, without the intervention of a third person, the squib would not have injured the plaintiff.

In *Dixon v. Bell*, 5 Maule & S. 198, the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed, the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off, and injured the child. The defendant was held liable, "as by this want of care," says Lord ELLENBOROUGH,—"that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed,"—"the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable."

In *Hott v. Wilkes*, 3 Barn. & Ald. 304,—the well-known case as to spring-guns,—it became necessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice BAYLEY and Mr. Justice HOLROYD appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin v. Crump*, 8 Mees. & W. 782, the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In *Illidge v. Goodwin*, 5 Car. & P. 192, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident.

But TINDAL, C. J., ruled that, even if this were believed, it would not avail as a defense. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done."

Lynch v. Nurdin, 1 Q. B. 29, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord DEXMAN. He says: "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but, at most, by that negligence in combination with two other active causes,—the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the chief justice puts the case of a game-keeper leaving a loaded gun against the wall of a play-ground where school-boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord DEXMAN, "that the game-keeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present chief justice of the common pleas in its support in *Illidge v. Goodwin*, 5 Car. & P. 190." It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here.

In *Daniels v. Potter*, 4 Car. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendant's men were lowering casks into it, as the plaintiffs contended, without proper care having been taken to secure it. The flap fell, and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up as a defense that its fall had been caused by some children playing with it. But the only question left to the jury by TINDAL, C. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that

case only would the intervention of a third party causing the injury be a defense. The cases of *Hughes v. Macfie*, 2 Hurl. & C. 744, 33 Law J. Exch. 177, and *Abbott v. Macfie*, Id.; two actions arising out of the same circumstances, and tried in the passage court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendants' liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held that, while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

Bird v. Holbrook, 4 Bing. 623, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a peafowl, the property of a neighbor, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

In the course of the discussion the similar case of *Jay v. Whitfield*, at page 644, 4 Bing., [cited in 3 Barn. & Ald. 308,] was mentioned,—tried before RICHARDS, C. B.,—in which a plaintiff who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill v. New River Co.*, 9 Best & S. 303, the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses, passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were construct-

ing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows v. Coke Co.*, L. R. 7 Exch. 96, it was held in the exchequer chamber, affirming a judgment of the court of exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon, the servant of a gas-fitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gas-fitter's man in examining the pipe with a lighted candle in his hand.

In *Collins v. Commissioners*, L. R. 4 C. P. 279, the defendants were bound, under an act of parliament, to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiffs' land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice MoxTague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or some one else did." "I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrong-doers from preventing a part of the injury."

The case of *Harrison v. Railway Co.*, 3 Hurl. & C. 231, 33 Law J. Exch. 266, belongs to the same class. The defendants were bound, under an act of parliament, to maintain a delph or drain with banks for

carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an act of parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition; but it was also found, and it was on this that the defendants relied as a defense, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their act. Nevertheless the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which, in the ordinary course of things, were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In *Greenland v. Chaplin*, 5 Exch. 243, at page 248, POLLOCK, C. B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the court of common pleas, in the recent case of *Sharp v. Powell*, L. R. 7 C. P. 253, held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the police act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse, coming along, fell in consequence, and was injured. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened. BOVILL, C. J., there says: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom,

but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." And GROVE, J., said: "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have, no doubt, often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If, on the present occasion, the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Mr. Justice KEATING said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant, would have been that the water would, under ordinary circumstances, have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892, and *Dixon v. Bell*, 5 Maule & S. 198, and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or a private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and, if this should be done, the probability is that the obstruction so removed will, instead of being

carried away altogether, be placed somewhere near. Thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the foot-path. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton*, 4 Hurl. & C. 388, L. R. 1 Exch. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil-cake without it being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle. The plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and, the machine being set in motion, three of his fingers were crushed. It was held by the court of exchequer that the defendant was not liable—*First*, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and, *secondly*, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But, be this as it may, that case cannot govern the present; for the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

(4 Denio, 464.)

VANDENBURGH v. TRUAX.

(Supreme Court of New York. May Term, 1847.)

NEGLIGENCE — PROXIMATE OR REMOTE CONSEQUENCES.

A boy, having had a quarrel with defendant in a city street, ran away from him. Defendant took up a pickaxe, and followed the boy, pursuing him into the store of plaintiff, by whom the boy was employed. In trying to save himself from being struck with the pickaxe, the boy knocked out the faucet from a cask of wine, and part of the wine ran out and was lost. Held, that defendant was liable for the damages to plaintiff. One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for all the consequences which may directly and naturally result therefrom, although he did not intend to do the particular injury which followed.

Error to Schenectady common pleas.

Action by Truax against Vandenburg, brought before a justice of the peace, for damages alleged to have been caused by defendant willfully driving a boy through plaintiff's store, and knocking a cork or faucet from a barrel of wine belonging to plaintiff, causing part of the wine therein to be lost. The evidence was that defendant had quarreled with a negro boy, about 16 or 18 years of age, employed by plaintiff as an hostler, while both were in the street near plaintiff's store in the city of Schenectady; that, the boy having a stone in his hand, defendant took hold of him, and told him to throw down the stone; that the boy did so, and broke loose from defendant and ran away; that defendant then took up a pickaxe, and followed the boy, who fled into plaintiff's store, where defendant pursued him, having the pickaxe in his hand; that, the rear door of the store being shut, the boy, not being able to escape through it with out being overtaken, ran behind the counter, as the witness testified he believed, to save himself from being struck with the pickaxe; and that, in doing so, he knocked out the cork or faucet of a cask of plaintiff's wine, and wine of the value of \$4 was spilt and lost. The justice rendered judgment for plaintiff, which was affirmed by the court of common pleas. Defendant brought error to review the judgment of the common pleas.

P. Potter, for plaintiff in error.

No action will lie against defendant. The injury was not the joint act of defendant and the negro. The latter was a free agent, at liberty to go where he pleased. It cannot be said that defendant drove him into plaintiff's store against the cask of wine. The case is not within *Scott v. Shepherd*, 2 W. Bl. 892.

S. A. Daggett, for defendant in error.

All who direct, assist, or in any way contribute to a trespass are liable as principals, and may be sued jointly or severally. 1 Chit. Pl. 67; *Thorp v. Burling*, 11 Johns. 285; *Bishop v. Ely*, 9 Johns. 294; *Guille v. Swan*, 19 Johns. 382.

Bronson, C. J. It may be laid down as a general rule that when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable

ble, in some form of action, for all the consequences which may directly and naturally result from his conduct, and in many cases he is answerable criminally as well as civilly. It is not necessary that he should intend to do the particular injury which follows, nor, indeed, any injury at all. If a man without just cause aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon the friend, and may be murder if a deadly weapon was used, and death ensued. Or if, in attempting to steal or destroy the property of another, he unfortunately wound the owner, or a third person, he must answer for the consequences, although he did not intend that particular mischief. And, although no mischief of any kind may be intended, yet, if a man do an act which is dangerous to the persons or property of others, and which evinces a reckless disregard of consequences, he will be answerable civilly, and in many cases criminally, for the injuries which may follow; as if he discharge a gun, or let loose a ferocious or mad animal, in a multitude of people; or throw a stone from the house-top into a street where many are passing; or keep a large quantity of gunpowder near the dwelling of another. In these and such like cases he must answer for any injury which may result from his misconduct to the persons or property of others. And, if the act was so imminently dangerous to others as to evince a depraved mind, regardless of human life, and death ensue, it will be murder. These are familiar cases, which need not be proved by referring to books. In the case of the lighted squib which was thrown into the market-house, the debate was upon the form of the remedy. The question was whether the plaintiff could maintain trespass *vi et armis*, or whether he should not have brought an action on the case. His right to recover in some form seems not to have been disputed. *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403. In that case the impulse was given to inanimate matter, while here a living and rational being was moved by fear. But still there is in some respects a striking analogy between the two cases. There the force which the defendant gave to the squib was spent when it fell upon the standing of Yates; and it was afterwards twice put in motion, and in new directions, first by Willis, and then by Ryall, before it struck the plaintiff, and put out his eye. But as the throwing of the squib was a mischievous act, which was likely to do harm to some one, and as the two men who gave the new impulses to the missile acted from terror and in self-defense, the defendant was held answerable as a trespasser for the injury which resulted to the plaintiff. Now, here, although the negro boy may have been wrong at the first, yet when he had thrown down the stone, and was endeavoring to get away from the difficulty into which he had brought himself, the defendant was clearly wrong in following up the quarrel. When the boy ran upon the cask of wine, he was moved with terror produced by the illegal act of the defendant; he was fleeing for his life, from a man in hot pur-

suit, armed with a deadly weapon. The injury which the plaintiff sustained was not the necessary consequence of the wrong done by the defendant, nor was it so in the case of the lighted squib. But in both instances the wrong was of such a nature that it might very naturally result in an injury to some third person. It is true that the boy might have gone elsewhere, instead of entering the plaintiff's store; and it is equally true that Willis and Ryall might have thrown the squib out of the market-house, which was open on both sides and at one end, instead of tossing it across the market-house among the people there assembled. But in the one case, as well as in the other, the innocent agents were moved by fear, and had no time to reflect upon the most prudent course of conduct. It was quite natural, however, that the boy should flee to his employer for protection. And, finally, the proximate cause of the injury was, in both cases, an intelligent agent.

In *Guille v. Swan*, 19 Johns. 381, the immediate actors in the wrong which was done to the plaintiff were moved by their sympathy for the defendant, who had brought himself into a perilous condition by ascending in a balloon. The balloon descended into the plaintiff's garden, which was near where it had gone up, and a crowd of people, seeing the defendant hanging out of the car in great peril, rushed into the garden to relieve him, and, in doing so, trod down the plaintiff's vegetables and flowers. For the wrong done by the crowd, as well as for the injury done by himself, the defendant was held answerable as a trespasser. Although the ascent was not an illegal, it was a foolish, act, and the defendant ought to have foreseen that injurious consequences might follow. The case seems not to have been put upon the ground of a concert of action between the defendant and the multitude, but on the ground that the defendant's descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation. It was added, however, that if the defendant had beckoned to the crowd to come to his assistance, they would all have been co-trespassers; and the situation in which the defendant had voluntarily and designedly placed himself was equivalent to a direct request to the crowd to follow him.

If the cases of the squib and the balloon have not gone beyond the limits of the law, the defendant is answerable for the injury which he has brought upon the plaintiff. And there is nearly as much reason for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would be if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned. It is not necessary to inquire whether the action should be trespass or case; for this declaration may as well be considered one thing as the other. It seems that the plaintiff, when before the justice, called the action trespass; but the declaration does not al-

lege that the act was done either *vi et armis* or *contra pacem*. Courts of record might well enough have been less nice than they have been about the distinction between trespass and case. *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill, 170. And clearly, as the pleadings in justices' courts are construed in the most liberal manner for the advancement of justice, this may very well be regarded as an action on the case.

Judgment affirmed.

(99 N. Y. 158, 1 N. E. Rep. 608.)

LOWERY v. MANHATTAN RY. CO.

(Court of Appeals of New York. May 5, 1885.)

NEGLECTANCE — PROXIMATE OR REMOTE CONSEQUENCES.

Fire from defendant's locomotive on its elevated railway fell upon a horse attached to a wagon in the street below, and upon the hand of the driver, causing the horse to run away. The driver, after failing in an attempt to stop the horse by driving him against a post of the elevated railroad, intentionally turned him against the curb-stone to arrest his progress; but the wagon passed over the curb-stone, threw out the driver, and ran over and injured plaintiff. *Held*, that defendant was not relieved from liability for the injury to plaintiff, even though plaintiff would not have been injured but for the driver's diversion of the horse from the natural course it might have taken, and though there might have been an error of judgment on the driver's part; as it might be assumed that by the injury to his hand, and the suddenness of the accident, the driver was so disconcerted as to be unable to manage and control the horse as he would otherwise have done. *RAPALLO, J.*, dissenting.

Appeal from court of common pleas, city and county of New York, general term.

Action by Joseph Lowery against the Manhattan Railway Company, for personal injuries to plaintiff, an infant, alleged to have been caused by negligence on the part of defendant.

Hugh L. Cole, for appellant. *Osborne E. Bright*, for respondent.

MILLER, J. The principal question arising upon this appeal relates to the right of the plaintiff to recover for the injuries sustained. The claim of the defendant is that the cause of the injury was too remote to authorize a recovery of any damages whatever, and it is urged that the court erred in denying the motion to dismiss the complaint made by the defendant's counsel on the ground stated, as well as in the charge to the jury that, if they believed "that the coal and ashes fell from the defendant's locomotive through any negligence on the part of the defendant, its servants or agents, and, falling upon the horse, caused him to become unmanageable and run against the plaintiff, inflicting injuries upon him, then the defendant is liable to the plaintiff for his damages occasioned thereby." The same question was also raised by the defendant's counsel by a request to the judge to charge that "if the jury believed the accident occurred through the driver's error of judgment in endeavoring to obtain con-

trol of his horse the plaintiff cannot recover," which was refused, and an exception duly taken to the decision. It is urged by the appellant's counsel that, where there is an intermediary agent or medium between the primary cause of the injury and the ultimate result, the rule of law to be applied is that where the original act complained of was not voluntary or intentional, or one of affirmative illegality, or in itself the cause of criminal complaint, but was caused by negligence, the responsibility is limited to the necessary and natural consequences of the act, and that when, beyond that, they are or may be modified or shaped by other causes, they are too remote to be the foundation of legal accountability. The injury sustained by the plaintiff was caused by reason of fire falling from a locomotive of the defendant upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse became frightened, and ran away, and the driver attempted to guide his movements, and drive him against a post of the elevated railroad so as to stop him. Failing to accomplish this, he intentionally turned the horse, and attempted to run him against the curbstone to make it heavy for him, and so arrest his progress; but the wagon passed over the curbstone instead of being arrested by it, and threw the driver out, and ran over and injured the plaintiff. It will be seen that the injury was not caused directly by the defendant, but was produced through the instrumentality of the horse and driver, the latter of whom, it appears, was doing all that lay in his power, and exercising his best judgment, in attempting to stop the frightened animal, and to prevent any further injury; and the question we are called upon to consider here is whether, in view of the fact that the plaintiff may have been injured by reason of the management of the horse by the driver, in consequence of which it was diverted from the natural course it might otherwise have taken, the defendant is relieved from responsibility for the result of the accident.

It may be assumed that at that time the driver, who was smarting from the effects of the burning coal which had fallen upon his hands, and startled by the suddenness of the accident, may have been somewhat disconcerted by the peril in which he was placed, and therefore was unable to manage and control the infuriated animal as he might otherwise have done. The law, however, makes allowances for mistakes and for errors of judgment which are likely to happen upon such an emergency. It does not demand the same coolness and self-possession which are required when there is no occasion for alarm or a loss of self-control. Where a person is traveling upon a train of cars, and a collision has taken place, or is likely to occur, and he, under the excitement of the moment, jumps from the train, and thereby increases his own danger and chances of injury, although the act of attempting to escape is very hazardous and negligent, yet it is an instinctive act which naturally would take place

when a person seeks to avoid great peril, and, though wrong in itself, that fact does not relieve the company from liability if its negligent conduct and a sense of impending danger induced the act.

In the case under consideration the driver was passing along in pursuit of his customary business, driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability. If he had allowed the horse to continue on its own way, it is by no means clear that a similar, if not greater, injury might not have been inflicted upon some other person than the plaintiff. It is impossible to determine what the result might have been in such a case, and therefore it is indulging in speculation to say that the driver's act, under the circumstances, was not the best thing that could have been done. In such cases it is difficult to disconnect the final injury from the primary cause, and say that the damages accruing are not the natural and necessary result of the original wrongful act. The defendant was chargeable with an unlawful act, which inflicted an injury upon the driver and the horse in the first instance, and ultimately caused the injury sustained by the plaintiff. The injury originally inflicted was in the nature of a trespass, and the result which followed was the natural consequence of the act. So long as the injury was chargeable to the original wrongful act of the defendant, it is not apparent, in view of the facts, how it can avoid responsibility. There was no such intervening human agency as would authorize the conclusion that it was the cause of the accident, and therefore it cannot be said that the damages were too remote.

The company would clearly be liable for any direct injury arising from the falling of the burning coals upon the horse if it had been left to pursue its own course uncontrolled by the driver, and there would seem to be no reason why it would not be equally liable when the driver seeks to control the horse, and exercises his best judgment in endeavoring to prevent injury. That he failed to do so for want of strength, or by reason of an error of judgment, does not prevent the application of the principle which controls in such a case. It may, we think, be assumed that such an accident might occur in a crowded street where conveyances are constantly passing, and that the driver of the horse, who might possibly be injured by the defendant's unlawful act, would seek to guide the animal, and, if possible, prevent unnecessary injury. The action of the driver, in view of the exigency of the occasion, whether prudent or otherwise, may well be considered as a continuation of the original act which was caused by the negligence of the defendant, and the defendant was liable as much as it would have been if the horse had been permitted to proceed without any control what-

ever. We think that the damages sustained by the plaintiff were not too remote, and that the wrongful act of the defendant in allowing the coals to escape from the locomotive, thus causing the horse to become frightened and run, was the proximate cause of the injury, and that the running away of the horse, and the collision with the plaintiff, were the natural and probable consequences of the negligence of the defendant. These views are fully sustained by the decisions of the courts. *Scott v. Shepherd*, 2 W. Bl. 892; *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29; *Former v. Geldmecher*, 13 Reporter, 790; *Vaughan v. Menlove*, 32 E. C. L. 219, 740; *Guille v. Swan*, 19 Johns. 381; *Thomas v. Winchester*, 6 N. Y. 397; *Vandenburgh v. Truax*, 4 Denio, 464; *Webb v. Railroad Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 N. Y. 200; *Putnam v. Railroad Co.*, 55 N. Y. 108.

We do not deem it necessary to examine these cases in detail, and, while it may be said that in some of them the injury was caused by the positive unlawful act of the defendant at the beginning, in others the original act was lawful, while the consequence which followed resulted from the subsequent interference with the plaintiff's rights. In *Guille v. Swan*, 19 Johns. 381, supra, the act of setting up the balloon was lawful in itself, and the injury which followed was the result of its falling on the premises of the plaintiff in the city, and attracting the attention of people outside, and thus causing the damages incurred. In the case at bar, the falling of the coals on the horse and driver was caused by the negligence of the defendant's servants, but it was, nevertheless, a direct invasion of the rights of the property and person of the driver, and the owner of the horse and wagon, and produced the injury to the plaintiff the same as the falling of the balloon on the plaintiff's premises in the case last cited. We are unable to perceive any distinction between the two cases which would justify the conclusion that the damages to the plaintiff here were more remote than those which were incurred in the case last cited. The principle which is applicable to both cases is the same, and it is not apparent that any distinction can be drawn between them which would relieve the defendant from responsibility. It is enough to charge the defendant that it was the author and originator of the wrongful act which produced the injury, and hence it is liable for the same as one of the natural consequences arising from the act itself. It is difficult to conceive any valid ground upon which it can be claimed that the effect of the defendant's negligence was not a probable and the natural consequence following the same.

We are referred to numerous cases cited by the appellant's counsel, which, it is claimed, sustain the doctrine contended for by him; and great reliance is placed upon the case of *Ryan v. Railroad Co.*, 35 N. Y. 210, which was followed and sustained in *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353. In the *Ryan* Case the court defined "remote damages" to be those which are not an ordinary and natural,

not an expected, not a necessary and usual, result of the negligent act. It appeared in that case that the fire was communicated first to the defendant's building from a locomotive on its road, and then, over a space of 130 feet, to the building of the plaintiff; and it was held that the defendant was not liable, for the reason that it was not to be anticipated that the fire would be communicated to premises not contiguous. This is far different from a case where a direct injury is inflicted upon a person and property; as, in the case at bar, it was inflicted in a populous city upon a horse and driver, and caused the horse to become frightened and run away, and it can scarcely be claimed that the consequence which ensued was not the probable and direct cause of the injury sustained. The two cases last cited were considered and reviewed by *FOLGER, J.*, in *Webb v. Railroad Co.*, 49 N. Y. 420, supra. In that case the fire was communicated by live coals dropping from the engine and setting fire to a tie on the track, which, spreading to an old tie by the side of the track, and from that to some rubbish, and then to the fence along the track, and then to plaintiff's woodland, did the damage complained of, and it was held that the defendant was liable for the injury. It is laid down in the opinion that the *Ryan* Case held that the action in that case could not be sustained for the reason that the damages incurred by the plaintiff were not the immediate, but the remote, result of the negligence of the defendant; and it was stated that this was not a new rule. *FOLGER, J.*, says in regard to that case: "The pith of the decision is that this was a result which was not necessarily to be anticipated from the fact of the firing of the wood-shed and its contents; that it was not an ordinary, natural, and usual result from such a cause, but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in *Vandenburgh v. Truax*, 4 Denio, 464, which was that the consequence complained of was the natural and direct result of the act of the defendant. This principle is said in the *Ryan* Case not to be inconsistent with that which controlled the disposition of the latter case, and to be unquestionably sound, but should be applied according to sound judgment in each case as it arises." After referring to the *Pennsylvania* decision, the learned judge concludes that the *Ryan* Case was not controlling in the disposition of the case considered, more than the long line of decisions which preceded it. It will be observed that the *Ryan* Case is clearly distinguishable from the case at bar, and can scarcely be held to be applicable to the facts presented here, and was not followed in the case last cited, although there was considerable similarity in the leading facts between the two cases. It certainly should not be held to be controlling where there was a positive and unlawful act of the defendant which, as

we have seen, induced the accident which was the cause of the plaintiff's injury. Nor have the courts of this state, since the decision of *Ryan v. Railroad Co.*, supra, held that it established any new or different rule than the one which has long existed, and which has been settled by repeated adjudications, as will be seen by the citations already made. In *Pollett v. Long*, 56 N. Y. 200, it was held that where an injury to one is caused by, and is the natural and probable result of, the wrongful act or omission of another, such other is liable therefor, although other causes put in motion by the act or omission, and which, in the absence thereof, would not have produced the result, contribute to the injury. It appeared in this case that the defendant's dam had given way and carried away a dam of the plaintiff, and, by increasing the volume of water, tore out the dam of a third party, of whom plaintiff was assignee, and the court charged, in substance, that defendant's negligence must have been the sole cause of the injury, or there could be no recovery; that, although defendant's dam was defective and out of repair, and in consequence gave way, if there was sufficient water in the middle pond when its dam gave way to materially increase the volume and force of the stream, then plaintiff could not recover for injuries to the lower dam, as the damages would be too remote. This was held error. *GROVER, J.*, in his opinion, after stating that *Ryan v. Railroad Co.*, and *Pennsylvania R. Co. v. Kerr*, supra, were cited in support of the charge and after discussing the *Ryan Case*, says: "Assuming that this rule was correctly applied in the case of *Ryan v. New York Central*, * * * it comes far short of sustaining the proposition under consideration." It will be seen that the *Ryan Case* is clearly distinguishable from the case at bar. We have carefully examined the other cases in this state which are cited and relied on by the appellant's counsel, and none of them hold that no responsibility exists where the evidence establishes an act of the defendant which was the cause of injury to a third person, although that injury may have been occasioned by the intermediate agency and through the instrumentality of a party who, in the first instance, was the direct object from which sprang the final result, which was the cause of the damages claimed. We think that no such case can be found in the reports. The decisions which are relied upon from other states do not present a state of facts which can be regarded as entirely analogous to the case at bar, and even if any of them may be considered as leaning in the direction claimed, in view of the fact that the decisions in this state are to the contrary, they are not decisive of the question considered. There was sufficient evidence of the defendant's negligence to submit the case to the consideration of the jury, as was done. There was no error in the charge of the judge, or refusals to charge as requested, or in any ruling on the trial. The judgment was right, and should be affirmed. All concur, except *RAPALLO, J.*, dissenting, and *EARL, J.*, not voting.

(94 U. S. 469.)

MILWAUKEE & ST. P. RY. CO. v. KELLOGG.
(*Supreme Court of the United States.* Oct. Term, 1876.)

NEGLIGENCE — DESTRUCTION OF IMPROVEMENTS OF OCCUPYING CLAIMANTS.

Under the provisions of Code Iowa, §§ 1976-1981, giving to an occupant of land under color of title, who in good faith has made valuable improvements thereon, but is afterwards judicially found not to be the rightful owner thereof, the right to compensation for his improvements, the right of such an occupant to recover for the willful or negligent destruction of his improvements cannot be affected by proof that the title to the land is in another.

2. SAME—FIRES—EXPERT TESTIMONY.

In an action for damages for the destruction of plaintiff's saw-mill and lumber by fire communicated from defendants' elevator, testimony of experts in the business of fire insurance that, owing to the distance between the elevator and plaintiff's property, the former would not be considered in measuring the hazard of the latter, is not admissible, the subject being a matter of common observation.

3. SAME—PROXIMATE OR REMOTE CONSEQUENCES.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attendant circumstances. When there is no intermediate efficient cause, disconnected from the primary fault, and self-operating, which produced the injury, the original wrong must be considered as reaching to the effect, and proximate to it.

4. SAME.

Defendants' elevator, 120 feet high, built of pine lumber, and standing on the bank of a river, was set on fire from a steam-boat, also owned by defendants, which made a landing at the elevator when an unusually strong wind was blowing towards it; and the fire was communicated from the elevator to plaintiff's saw-mill, 538 feet from the elevator, and to his lumber, the nearest pile of which was 388 feet distant from the elevator, in the direction in which the wind was blowing, and they were destroyed. Plaintiff brought an action to recover damages therefor from defendants on the ground of negligence of the latter in setting fire to their elevator. *Held*, that it was not error to refuse to instruct the jury that the injury was too remote from the negligence to afford ground for a recovery, and to submit to them to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued effect of the sparks from the steam-boat, without the aid of other causes not reasonably to have been expected; and that a finding of the jury that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator was, in effect, a finding that there was no intervening and independent cause between the negligent conduct of defendants and the injury to plaintiff.

Error to the circuit court of the United States for the district of Iowa.

John W. Cary, for plaintiffs in error.
Myron H. Beach, for defendant in error.

STRONG, J. This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the state of Iowa, and on the banks of the River Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions it appears that the "plaintiff alleged the fire was negli-

gently communicated from the defendants' steam-boat Jennie Brown to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber-piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steam-boat and elevator; that the mill was five hundred and thirty-eight feet from the elevator; and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in the occupation of it, believing he had a right to be there."

Such having been the admissions, the court refused to allow the parties to try the title to the land upon which the mill and lumber had been placed, proof of title being, in the opinion of the court, immaterial. To this ruling the defendants excepted, and it is the first error they have assigned. We are unable to perceive any reason why the proof offered was not, as the circuit court held it to be, perfectly immaterial to the issue between the parties. By the law of the state of Iowa, "where an occupant of the land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards, in a proper action, found not to be the rightful owner thereof," he is entitled to payment or credit for the value of his improvements. Code Iowa, §§ 1976-1981. The effect of this statute is to make such an occupant practically the owner of his improvements, even though he be not the owner of the land on which they have been made. If, therefore, the title to the land had been shown to be in the defendants, the proof would not have affected the right of the plaintiff to recover compensation for willful or negligent destruction of the buildings and lumber. Nor could it have changed the degree of prudence and care which the defendants were bound to exercise in order to guard against injury to that property. The plaintiff is not to be regarded as a mere trespasser, wantonly thrusting himself or his property in the way of danger,—a trespasser to whom the defendants owed a less degree of caution than would have been due if he had been the undisputed owner of the fee-simple of the land on which the mill stood. We cannot admit that the defendants owed no duty to the plaintiff, even if he was occupying their land without their consent. An attempt was made during the argument to maintain that they had been found by the jury guilty only of an act of omission, and it was insisted that such an act would not give a right of action to the plaintiff if he was wrongfully in possession of their land. Neither the fact asserted, nor the inference drawn from it, can be conceded. The verdict of the jury

was: (1) That the elevator was burned from the steamer Jennie Brown; (2) that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and (3) that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator. The only reasonable construction of the verdict is that the fault of the defendants—in other words, their want of ordinary care and prudence—consisted in landing the steamer at the elevator in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, or want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred that, while the wind was blowing a gale from the steam-boat towards and in the direction of the elevator, the defendants carelessly and negligently allowed, permitted, and counseled, (or, as stated in another count, "directed,") the steam-boat to approach and lie alongside of or in close proximity to said elevator. This is something more than non-feasance; it is positive action,—the result, consequence, or outworking, as the jury have found it, of the want of such care as should have been exercised.

It has been further argued in support of this assignment of error that the proffered proof of title should have been admitted, because it tended to show contributory negligence on the part of the plaintiff. But we cannot understand how it could have had any such tendency. Whether the mill stood on the defendant's land, or on the other land equally distant from the steamer and elevator, and in the same direction, its exposure to the fire was exactly the same.

A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing the rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber-piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of the mill or lumber. This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, (*Keller v. Railroad Co.*, 2 Abb. Dec. 480.)

or whether it was prudent to blow a whistle at a particular time, (*Hill v. Railroad Co.*, 55 Me. 433.) Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. *Mulry v. Insurance Co.*, 5 Gray, 541. In *Durrell v. Bederley*, Holt, N. P. 283, Chief Justice GIBBS said: "The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence." *Pow. Ev.* (4th Ed.) 103. And in *Campbell v. Rickards*, 5 Barn. & Adol. 846, Lord DENMAN said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another." See, also, Lord MANSFIELD's opinion in *Carter v. Boehm*, 3 Burrows, 1905, 1913, 1914, and *Higgins v. Dewey*, 107 Mass. 494, in which it was ruled that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land, and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land, was inadmissible.

The next exception is to the refusal of the court to instruct the jury, as requested, that "if they believed the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber-pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steam-boat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case, and in its support the two cases of *Ryan v. Railroad Co.*, 35 N. Y. 210, and *Railroad Co. v. Kerr*, 62 Pa. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided, and it may perhaps be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent

wrong-doer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. *Webb v. Railroad Co.*, 49 N. Y. 420, and *Railroad Co. v. Hope*, 80 Pa. St. 373. And certainly they are in conflict with numerous other decided cases. *Kellogg v. Railroad Co.*, 26 Wis. 224; *Perley v. Railroad Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Fent v. Railroad Co.*, 59 Ill. 349. The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown into the market-place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill, and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore

always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for the rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are discovered by new and independent agencies, and this must be determined in view of the circumstances existing at the time. If we are not mistaken in these opinions, the circuit court was correct in refusing to affirm the defendant's proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must therefore be affirmed.

(5 Cow. 351.)

MOODY v. BAKER.

(*Supreme Court of New York.* Feb. Term, 1826.)

1. SLANDER — SPECIAL DAMAGE — BREAKING OFF MARRIAGE.

An action may be maintained for words spoken of plaintiff by defendant, whereby a contract of marriage between plaintiff and another person was broken off by the latter, although such words are not in themselves actionable, and although plaintiff has a remedy against such other person for breach of the contract. *Vicars v. Wilcocks*, 8 East, 1, disapproved.

2. SAME—EVIDENCE.

In such an action, a conversation between the person who had so broken his contract to marry plaintiff and another, not offered to support testi-

mony given by the former as a witness in the case, but as independent evidence, is not admissible.

Savage, C. J., dissenting.

Motions in arrest of judgment and for a new trial.

Action for slander. The declaration alleged a contract of marriage between plaintiff and one Parkman Baker; that defendant, to prevent such intended marriage, stated to said Parkman Baker that he had carnal intercourse with plaintiff, by reason whereof said Parkman Baker refused to marry plaintiff. At the trial, the judge refused to allow one Halsey Phelps, a witness for defendant, to testify to a conversation between himself and Parkman Baker, who was also a witness; the purpose for which such evidence was offered being to show that Parkman Baker had not been influenced to break off the marriage by what defendant had said. The jury found a verdict for plaintiff. Defendant moved in arrest of judgment, on the ground that the declaration was insufficient. He also made a motion for a new trial, mainly on an objection to the exclusion of said testimony of Halsey Phelps.

J. L. Richardson and T. J. Oakly, for the motions. *A. Spencer*, opposed.

BY THE COURT, per **WOODWORTH, J.** The words spoken are not in themselves actionable. If the action is sustainable, it must be on the ground of special damage. It is contended on the part of the defendant that no action can be maintained on the facts alleged in the declaration. The case of *Vicars v. Wilcocks*, 8 East, 1, is relied on as an authority in point. In that case it was held that, when special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person, induced by the slander, but the special damage must be a legal and natural consequence of the words spoken. It appeared that in consequence of speaking the words the plaintiff had been dismissed from his employment before the end of the term for which he had contracted. Lord ELLENBOROUGH proceeded on the ground that this was an illegal consequence,—a mere wrongful act of the master, for which the defendant was not answerable,—and inquired whether any case could be mentioned of an action of this sort sustained by proof only of an injury by the tortious act of a third person. If the doctrine here advanced is well founded, it disposes of the case before us. The learned judge does not refer to any authority in support of the decision. In my view, it seems to be a departure from well-established principles, applicable to this species of action. *Morris v. Langdale*, 2 Bos. & P. 284, was cited on the argument as supporting the doctrine laid down by Lord ELLENBOROUGH. The plaintiff in that case stated that he was a dealer in the funds, and as such had been accustomed to contract; that the defendant said of him, as such dealer, "He is a lame duck," in consequence of which divers persons refused to fulfill their contracts with him, and he was pre-

vented from fulfilling his contracts with other persons. It was held that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the plaintiff was a lawful dealer in the funds, and that the declaration was therefore bad. Part of the *gravamen* was that divers persons refused to fulfill their contracts. If the test is that the special damage must be legal and natural consequence of the words spoken, and that the plaintiff is not entitled to recover because he had a right of action on his contract, it is surprising that this ground had not been taken by the counsel who argued. But it is not even suggested. The opinion of the court also seems to be placed on other grounds. It is true, Lord ELDON observed that a doubt had arisen in the mind of the court whether the special damage had been so laid as to support the action, and that, if the plaintiff had sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons. These remarks were not necessary to the decision of the cause. Admitting them, however, to be correct, the case was not like the present. If persons had refused to fulfill their contracts with the plaintiff, he was entitled to recover damages. The court probably considered it substantially a contract for the payment of money, in which case the refusal to pay by the debtor in consequence of the speaking of slanderous words would not be a ground of special damage. Most, if not all, the cases for loss of marriage, to be met with in the books, allege a communication or treaty of marriage only, and that the marriage was lost by reason of speaking the words. *Davis v. Gardiner*, 4 Coke, 17; *Southold v. Daunston*, Cro. Car. 269; *Brian v. Cockman*, Id. 322; *Holwood v. Hopkins*, Cro. Eliz. 787.

By a communication or treaty of marriage must, I think, be understood, that the parties had contracted to marry each other. If this had not taken place, how can it be said, correctly, that a marriage was lost? In this case a valid contract of marriage is set out in the declaration. That the action can be maintained will not be questioned, if it be shown that the law has given this remedy in cases analogous and similar in principle. It is a general rule that, where a man has a temporal loss or damage by the wrong of another, he may have an action on the case, to be repaired in damages. 1 Com. Dig. tit. "Action on the Case," A. p. 178. If a party has several remedies for the same thing, he has an election to pursue either. Co. Litt. 145, a. But, after having recovered satisfaction for the injury from one person, he cannot afterwards proceed against any other person for a further satisfaction. *Bird v. Randall*, 3 Burrows, 1354. The case of *Bird v. Randall*, 3 Burrows, 1345, was twice argued, and decided after great consideration. The principles recognized and acted upon by the court, if sound, are, in my mind, decisive of the present question. It appeared that one Burford, by articles of agreement,

covenanted to serve the plaintiff for five years as a journeyman, and bound himself in the penalty of £100. After continuing a part of the time, the defendant procured and enticed him to depart, which he accordingly did. The plaintiff sued Burford for the penalty, and recovered judgment against him, but the money was not actually paid until after the commencement of the action against the defendant. The question was whether it was maintainable. It is remarkable that the point whether the action could be sustained (inasmuch as the plaintiff had a remedy on the contract) was not even hinted at by the court or counsel. It is manifest that no such notion of the law was then entertained; for Lord MANSFIELD, who delivered the opinion of the court, observed that the case turned upon two points: (1) Whether the plaintiff could maintain the action if the £100 recovered against the servant had been actually received before the commencement of the action; and, (2) if it could not, whether the receipt of the money subsequently would vary the case. I cannot well conceive of a more perfect recognition that the fact of an existing remedy on the contract formed no objection. All the reasoning of his lordship goes clearly to prove this. The ground upon which he places the decision is that satisfaction had already been received, which implies that, if it had not, there was no obstacle in the way. This case is very analogous to the one before us. In each there was a contract between the plaintiff and another person, and in each the attempt was to recover damages by proof of an injury sustained by the tortious act of a third person. If, then, the principle recognized in *Bird v. Randall* would authorize a recovery, when there was a contract of service, upon which damages might be recovered, I think it will apply with greater force when there has been a contract of marriage, and performance of it refused in consequence of the slander of the defendant. A contract of marriage looks principally to a specific execution. It is of a very different nature and character from the preventing of the fulfillment of a contract to pay a sum of money. In the latter case, the non-fulfillment of the contract by means of a third person would have no effect on the ability of the contracting party; whereas, in a case of the specific execution of a contract to marry, its value does not depend on the ability of a person to pay damages. It is, indeed, a temporal loss, but of a character not capable of being wholly repaired by the payment of money,—the only substitute the law has devised. But there are other cases which rest on the same principle. If one slanders my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the disturber, yet I may have an action against him that caused the disturbance. 1 Bac. Abr. tit. "Action on the Case," p. 98; *Newman v. Zachary*, Aleyn, 3. This is equally against the doctrine of Lord ELLENBOROUGH, for here damages are given which were caused by the tortious act of a third person. Again, in the action for enticing

away another's servant, the servant is always liable, and yet the law is well settled that the seducer is also liable. *Regina v. Callingwood*, 2 Ld. Raym. 1116; *Hart v. Aldridge*, Cowp. 54; *Reeve*, Dom. Rel. 376; 4 Bac. Abr. 593. The doctrine contended for strikes at the root of society, and, in my view, overturns some of the well-settled and revered principles of the common law. I cannot, therefore, doubt that the declaration contains a good cause of action, and that the motion in arrest of judgment should be denied.

The next question is whether there is ground for a new trial. The plaintiff proved the speaking of the words, and there existed a contract of marriage between Parkman Baker and the plaintiff. This was proved by the admissions and confessions of the defendant. He confessed that the day had been fixed for their marriage. The marriage was broken off. It is proven that the defendant admitted he had told P. Baker these things, (meaning his pretended illicit intercourse with the plaintiff,) and that he had once prevented their marriage, and wished yet to do so, and desired others to assist him in preventing it. The inference from all this is not only that he once prevented it by his slanders, which is enough to maintain the action, but that he entirely frustrated the marriage. The facts offered to be proved by Halsey Phelps, so far as respects Parkman Baker, were not offered as confirmatory of the evidence given by him, nor to show that he had made declarations consistent with what he had sworn. The offer was to prove a conversation between two persons, not parties to the suit, to make out a fact, that P. Baker was not influenced by his father's slanders; but the offer went to what Phelps had told P. Baker, as well as what P. Baker had told the witness. As to the declarations of Phelps, they were clearly inadmissible. When the judge rejected the evidence offered as one connected proposition, if the defendant intended or wished to prove P. Baker's declarations to Phelps, as showing the consistency of his evidence, it was the duty of the counsel to offer it in that light, and with that view. The language of the judge must have been that he could not admit a conversation between two persons, not parties to the action, to be given in evidence. It is manifest the defendant did not wish to give in evidence P. Baker's declaration unaccompanied with what Phelps told him. If the latter was not admissible, then the evidence offered was rightly rejected. The credibility of Parkman Baker was a question for the jury to decide. From the facts in the case, they were fully warranted in disregarding his testimony. The damages, although liberal, are not so extravagant as to require the interposition of the court. There are no grounds to believe the jury were influenced by passion, prejudice, or partiality. The motion for a new trial must be denied.

SAVAGE, C. J., dissented.

Motion denied.

(6 Q. B. Div. 333.)

BOWEN v. HALL *et al.*

(*Court of Appeal*. Feb. 5, 1881.)

INDUCING BREACH OF CONTRACT—PROXIMATE CONSEQUENCES.

A person who maliciously induces another to break a contract made by the latter with an employer for his exclusive personal services, where such breach would naturally cause, and does in fact cause, injury to the employer, is liable to the employer therefor, even though the relation between the employer and employed may not be, strictly and for all purposes, that of master and servant. The injury in such case is, in law as well as in fact, a natural and probable consequence of the wrongful act. Decision of the majority of the judges in *Lumley v. Gye*, 2 El. & Bl. 216, approved. COLERIDGE, C. J., dissenting.

Appeals from queen's bench division.

Action by Edward Bowen as against defendants Hall and Fletcher, for wrongfully enticing away and keeping the other defendant, Pearson, from the plaintiff's employment, and for wrongfully receiving and harboring him after notice of his being the servant of plaintiff; and, as against defendant Pearson, for unlawfully, and against the will of plaintiff, departing from the service of plaintiff. It appeared that plaintiff carried on the business of a brick-maker, and that in June, 1877, defendant Pearson entered into a written contract with plaintiff, whereby defendant agreed, for the consideration of certain prices named, "to find all labor for the whole manufacture, in a workmanlike manner, of best quality white-glazed bricks and baths, (with exception of hooping the baths and preparing the clay mass,) in such quantities as you require and when you require," and deliver any where they might be required on plaintiff's premises; and also agreed not to engage himself "to any one else for a term of five years;" and plaintiff agreed to the foregoing conditions, and to supply clay for the manufacture of said goods, and also to find all materials (with the exception of body and glaze, which defendant Pearson agreed to find) and tools, "and not engage any one else for the same work for a term of five years." Plaintiff alleged that the manufacture of white-glazed bricks and baths according to said samples was a secret known to defendant Pearson and only a few others, and that defendant Hall, who was a manufacturer of white-glazed bricks and baths in the neighborhood of plaintiff, did not know of the method of manufacture which Pearson used, and that therefore the bricks and baths he manufactured were inferior to those manufactured by Pearson on account of plaintiff. The complaint of plaintiff, for which this action was brought, was that in May, 1878, defendants Hall and Fletcher (the latter being Hall's manager) wrongfully induced Pearson, contrary to his said agreement with plaintiff, to depart from the exclusive service of plaintiff, and to manufacture on account of the defendant Hall glazed bricks and baths such as he had contracted to manufacture for plaintiff. Plaintiff claimed damages, not against all the defendants, but against only the two defendants, Hall and Fletcher. He also claimed an injunction

to restrain these defendants from employing defendant Pearson to do work for them at brick making or glazing, and he claimed an injunction to restrain defendant Pearson from engaging himself to defendants Hall and Fletcher until the expiration of his said contract of service with plaintiff. An interim injunction in the terms claimed was granted by FIELD, J., as against all the defendants. The action was tried before MANISTY, J., who held that there was no evidence to enable plaintiff to maintain his action against defendants Hall and Fletcher, and he therefore directed a verdict to be entered for those defendants; and, as regarded defendant Pearson, the learned judge was of opinion that, as that defendant had not acted or threatened to act contrary to the interim injunction, there was nothing to justify making such injunction perpetual. Plaintiff afterwards applied for and obtained a rule *nisi* against all the defendants for a new trial. The queen's bench division made such rule absolute as against defendants Hall and Fletcher, but it discharged the rule as to defendant Pearson. Defendants Hall and Fletcher appealed to the court of appeal against the order for a new trial, and there was a cross-appeal by plaintiff against the order discharging the rule as to defendant Pearson.

Argued before LORD SELBORNE, L. C., LORD COLERIDGE, C. J., and BRETT, L. J. *H. Matthews*, Q. C., and *Mr. Anstie*, for plaintiff. *Mr. Jell*, Q. C., and *J. O. Griffiths*, Q. C., for defendants Hall and Fletcher. *A. T. Lawrence*, for defendant Pearson.

During the argument the court expressed themselves to be satisfied that there was evidence to go to the jury as against all the defendants. An unsuccessful attempt was made by counsel for defendants to distinguish the present case from that of *Lumley v. Gye*, 2 El. & Bl. 216, 22 Law J. Q. B. 463, on the ground that there was nothing in the terms of the contract between plaintiff and Pearson to require the personal services of the latter. On the part of plaintiff it was contended that there existed between Pearson and plaintiff the strict relationship of master and servant, but that, if not, then the case came within the authority of *Lumley v. Gye*. It became necessary, therefore, to determine whether the judgment of the majority of the judges who decided *Lumley v. Gye*, or that of the dissenting judge, (COLERIDGE, J.,) was to be supported by a court of appeal. On this point the court took time to consider its judgment, and counsel in the meanwhile were to be at liberty to furnish the court with a reference to any further authority bearing on the decision in that case. The following authorities were afterwards furnished to the court, viz.: *Evans v. Walton*, L. R. 2 C. P. 615; *Cattle v. Water-Works Co.*, L. R. 10 Q. B. 453; *Haskins v. Royster*, 16 Amer. Rep. 780; *Burgess v. Carpenter*, Id. 643; *Bixby v. Dunlap*, 22 Amer. Rep. 475, and note at the end of that case; *Bryan v. State*, 44 Ga. 328; and *Walker v. Cronin*, 107 Mass. 555.

BRETT, L. J. The lord chancellor agrees

with me in the judgment I am about to read, and it is to be taken, therefore, as the judgment of the lord chancellor as well as of myself.

In this case, we were of opinion at the hearing that the contract was one for personal service, though not one which established strictly, for all purposes, the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service; that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson; was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff; was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained, nevertheless, the question whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of *Lumley v. Gye*, 2 El. & Bl. 216, 22 Law J. Q. B. 463. If that case was rightly decided, the objection in this case failed. The only question, then, which we took time to consider, was whether the decision of the majority of the judges in that case should be supported in a court of error. That case was so elaborately discussed by the learned judges who took part in it that little more can be said about it than whether, after careful consideration, one agrees either with the judgments of the majority, or with the most careful, learned, and able judgment of Mr. Justice COLERIDGE. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*, 1 Smith Lead. Cas. (8th Ed.) 264. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but, if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him,

or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord ELLENBOROUGH in *Vicars v. Wilcocks*, 8 East, 1, 2 Smith Lead. Cas. (8th Ed.) 554, requires this doctrine for its support, it is, in our opinion, wrong. We are of opinion that the propositions deduced above from *Ashby v. White* are correct. If they be applied to such a case as *Lumley v. Gye*, the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by COLERIDGE, J. 2 EL. & BL., at page 247. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The technical objections alluded to above have been suggested as the consequences of the judgment in *Vicars v. Wilcocks*, 8 East, 1, 2 Smith Lead. Cas. (8th Ed.) 554. But that judgment, when so used or relied on, seems to us to be disapproved in the opinions given in the house of lords in *Lynch v. Knight*, 9 H. L. Cas. 577, and seems to us when so used to be unreasonable. In the case of *Lumley v. Gye*, and in the present case, the third condition is fulfilled, namely, that the act of the defendant

caused an injury to the plaintiff, unless again it can be said correctly that the injury is too remote from the cause. But that raises again the same question as has been just dismissed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. That is stated in all the opinions in *Lynch v. Knight*. The injury is in such a case, in law as well as in fact, a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognized. It follows that in *Lumley v. Gye*, and in the present case, all the conditions necessary to maintain an action on the case are fulfilled. Another chain of reasoning was relied on by the majority in *Lumley v. Gye*, and powerfully combated by COLERIDGE, J. It was said that the contract in question was within the principle of the statute of laborers; that is to say, that the same evil was produced by the same means, and that as the statute made such means, when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means, employed with regard to parties standing in a similar relation, as also wrongful. If, in order to support *Lumley v. Gye*, it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of COLERIDGE, J., upon the second head of his judgment, seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the support of the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine, and we are therefore of opinion that the judgment of the queen's bench division was correct, and that the principal appeal must be dismissed.

SELBORNE, L. C., added the judgment of the court that the cross-appeal of plaintiff against the order discharging as to the defendant Pearson the rule for a new trial should be allowed, and that there should be a new trial as to all the defendants.

COLERIDGE, C. J., dissented, holding that *Lumley v. Gye*, 2 EL. & BL. 216, Law J. 22 Q. B. 463, should be overruled, and that the action against the defendants Hall and Fletcher was not maintainable; but as to defendant Pearson agreeing with the rest of the court.

Appeal of defendants Hall and Fletcher dismissed; cross-appeal of plaintiff as to defendant Pearson allowed.

(See also, *Scheffer v. Railroad Co.*, 105 U. S. 249; *Ehrgott v. Mayor of New York*, 96 N. Y. 264; *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. Rep. 31, 33, 34; *Adams v. Young*, 44 Ohio St. 80, 4 N. E. Rep. 599; *Railroad Co. v. Pennell*, 110 Ill. 435; *Hughes v. McDonough*, 43 N. J. Law, 459; *Lumley v. Gye*, 2 EL. & BL. 216.)

Torts, as distinguished from crimes, do not, in general, involve a wrongful intent.

(T. Raym. 467.)

BESSEY v. OLLIOT *et al.*

(Court of King's Bench. Trinity Term, 1632.)

TRESPASS—INTENT.

An action may be maintained for a trespass although there was no wrongful intent on the part of defendant, the ground of recovery being compensation for the loss or damage suffered.

Error to common pleas.

Action by Bessey against Olliot and Lambert for assault and false imprisonment. The following is an extract from the report of the decision:

In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and therefore Mich., 6 E. 4, 7, pl. 18. Trespass *quare vi et armis clausum fregit et herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for, though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river-side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

(Hobart, 134.)

WEAVER v. WARD.

(Court of King's Bench.)

ASSAULT AND BATTERY—INTENT.

Plaintiff was wounded by the discharge of a musket by defendant while both were engaged in military exercise as members of the same company. *Held*, that it was not a defense to a civil action therefor to plead that the injury was unintentional on defendant's part, for no man shall be excused of a trespass, except it may be judged utterly without his fault.

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, among others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise *in re mili-*

tari, against another captain and his band; and, as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging of his piece, did hurt and wound the plaintiff; which is the same, etc., *absque hoc*, that he was guilty *aliter sive alio modo*. And, upon demurrer by the plaintiff, judgment was given for him; for though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defense, playing their prizes, kill one another, this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass which tends only to give damages according to hurt or loss, it is not so; and therefore, if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass, (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*;) except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran cross his piece when it was discharging; or had set forth the case with the circumstances; so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

(19 Johns. 381.)

GUILLE v. SWAN.

(Supreme Court of New York. Jan. 1822.)

TRESPASS TO LAND—INTENT.

A balloon in which defendant had ascended near plaintiff's garden descended into the garden, with plaintiff's body hanging out of the car, so that he was in much danger. He called for help, and a crowd of persons broke into the garden, and plaintiff's vegetables and flowers were beaten down by the balloon and by the people. *Held*, that defendant was liable for all the damage so sustained by plaintiff, although the injury done by himself was involuntary, and although his ascending in the balloon was not an unlawful act.

Certiorari to review a judgment of a justice of the peace.

Action of trespass by Swan against Guille. Defendant had ascended in a balloon in the vicinity of plaintiff's garden, but the balloon descended into the garden, and defendant, whose body was hanging out of the car in a very perilous position, called for help to a person working in plaintiff's field. More than 200 people broke through plaintiff's fences into his garden, and his vegetables and flowers were trodden and beaten down by them, and by the balloon, which dragged over them about 30 feet, when defendant was taken out. The damage done by defendant and his balloon amounted to about \$15, but the crowd did much more, and the total damage to plaintiff was \$90. At the trial before a justice of the peace, he instructed the jury that defendant was liable for the damage done to plaintiff by the crowd as well as that done by defendant

himself. The jury found a verdict for plaintiff for \$90, and judgment for plaintiff was entered thereon. To review the judgment plaintiff brought *certiorari*.

SPENCER, C. J. The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that, upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery or a murder committed on the owner of the premises. The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in *Percival v. Hickey*, 18 Johns. 257. Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others. The case of *Scott v. Shepherd*, 2 W. Bl. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Shepherd threw a lighted squib, composed of gunpowder, into a market-house where a large concourse of people were assembled. It fell on the standing of Y., and, to prevent injury, it was thrown off his standing, across the market, where it fell on another standing. From thence, to save the goods of the owner, it was thrown to another part of the market-house, and, in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinion of three judges against one, that Shepherd was answerable in an action of trespass and assault and battery. DE GREY, C. J., held that throwing the squib was an unlawful act, and that, whatever mischief followed, the person throwing it was the author of

the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights on the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle that every one who does an unlawful act is considered as the doer of all that follows. A person breaking a horse in Lincoln's-Inn-Fields hurt a man, and it was held that trespass would lie. In *Leame v. Bray*, 3 East, 595, Lord ELLENBOROUGH said: "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one," he says, "put an animal or carriage in motion, which causes an immediate injury to another, he is the actor,—the *causa causans*." I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally. He is at the sport of the winds, and is to descend when and how he can. His reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not is immaterial. He had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted that, if the plaintiff in error had beckoned to the crowd to come to his assistance, he would be liable for their trespass in entering the inclosure? I think not. In that case they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd. He is therefore undoubtedly liable for all the injury sustained.

Judgment affirmed.

(See, also, *Striegel v. Moore*, 55 Iowa, 88, 7 N. W. Rep. 413, [trespass to lands;] *Anderson v. Arnold's Ex'r*, 79 Ky. 370; *Chapman v. State*, 78 Ala. 463, [assault and battery;] *Boyce v. Brockway*, 31 N. Y. 490; *Hollins v. Fowler*, L. R. 7 H. L. 757, [cases of conversion.] But in such torts as fraud, malicious prosecution, and other wrongs involving malice, a wrongful intent is necessary. See the cases hereinafter on these topics.)

Lunatics liable for torts.

(132 Mass. 87.)

MORAIN v. DEVLIN.

(*Supreme Judicial Court of Massachusetts*.
Jan. 3, 1882.)

NEGLIGENCE—DANGEROUS PREMISES—INSANITY OF OWNER.

The owner of a building may be liable for personal injuries to another caused by the defective condition of the building, although such owner is

insane, and a guardian has been appointed for him, and has the care and management of his estate.

Exceptions from superior court.

Action of tort by Sophia Morain against Margaret Devlin, for personal injuries to plaintiff, alleged to have been caused by a defect in a door-step of a tenement building belonging to defendant. At the trial it was admitted that, since a time sever-

al years before the accident to plaintiff, defendant had been insane, and had been confined in a hospital for lunatics; and that, at that time, a guardian for defendant had been appointed, who had ever since held the appointment, and had had the care and management of all the property of defendant. Said guardian was also appointed guardian *ad litem* for defendant. A request was presented to the judge, on behalf of defendant, for an instruction to the jury that, on these facts, as a matter of law, the action could not be sustained, but the request was refused. The jury found a verdict for plaintiff. Defendant alleged exceptions to the refusal to give the instruction requested.

E. T. Burley, for defendant. *W. F. Moyes*, for plaintiff.

GRAY, C. J. By the common law, as generally stated in the books, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, although, being incapable of criminal intent, he is not liable to indictment and punishment. *Bac. Max. reg. 7; Weaver v. Ward*, *Hob. 134; 2 Rolle, Abr. 547; 1 Hale, P. C. 15, 16; 1 Hawk. c. 1, § 5; Bac. Abr. "Idiots & Lunatics," E; Haycraft v. Creasy*, *2 East, 92, 104; 1 Chit. Pl. (2d Amer. Ed.) 65; Morse v. Crawford, 17*

*Vt. 499; Cross v. Kent, 32 Md. 581; Ward v. Conatser, 4 Baxt. 64; Bullock v. Babcock, 3 Wend. 391, 393, 394; Behrens v. McKenzie, 23 Iowa, 333, 343; Bank v. Moore, 78 Pa. St. 407, 412. See, also, Dickinson v. Barber, 9 Mass. 225; Brown v. Howe, 9 Gray, 84, 85. But this case does not require the affirmance of so broad a proposition. This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate or which the lunatic himself, and not his guardian, is the owner. *Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587, 591. The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him. Looney v. McLean, 129 Mass. 33; Gorham v. Gross, 125 Mass. 232; Bartlett v. Gas-Light Co., 117 Mass. 533. And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities of ownership of real estate. The ruling requested was therefore rightly refused. Exceptions overruled.**

MORTON and ALLEN, JJ., absent.

(See, also, *Ward v. Conatser, 4 Baxt. 64*. As to whether a lunatic will be liable for libel or slander the authorities are in doubt. Consult *Buswell on Insanity*.)

There is, however, no liability in tort for purely accidental injuries.

(6 Cush. 292.)

BROWN v. KENDALL.

(*Supreme Judicial Court of Massachusetts*.
Oct. Term, 1850.)

ASSAULT AND BATTERY—UNINTENTIONAL INJURY.

Defendant, while endeavoring to part fighting dogs, one of which was his own, by striking them with a stick, retreated backwards before them towards the place where plaintiff, the owner of the other dog, had been standing, plaintiff at the same time advancing a step or two towards them; and defendant, in raising his stick to strike the dogs, plaintiff being behind him, struck plaintiff in the eye with the stick, causing a severe injury. *Held*, that defendant's act in attempting to part the dogs was lawful and proper, and if, in doing it, he used due care and all proper precautions to avoid hurt to others, the injury to plaintiff was the result of pure accident, or was involuntary and unavoidable, and defendant was not liable therefor; nor was he liable, even though chargeable with some negligence, if plaintiff was also chargeable with negligence contributing as an efficient cause to the injury; and the burden was on plaintiff, in order to recover damages for the injury, to establish want of such due care on the part of defendant.

Exceptions from court of common pleas;
WELLS, C. J.

Action of trespass by George Brown against George K. Kendall for assault and battery. Pending the suit defendant died, and his executrix was substituted. At the trial it appeared from the evidence that while two dogs, belonging, respectively, to plaintiff and to defendant, were fighting, defendant, in order to separate them, took a stick and began beating

them. Plaintiff was also present, and looking on, at the distance of about a rod from the dogs, and advanced a step or two towards them. The dogs, as they struggled together, also approached plaintiff, and defendant retreated backwards from them, striking them with the stick. As defendant thus approached plaintiff, having his back towards the latter, in raising his stick over his shoulder to strike the dogs the stick accidentally struck plaintiff in the eye, and injured it severely. Defendant requested the judge to instruct the jury that, "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover;" and requested a further instruction to the jury that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff." The judge declined to give these instructions, and submitted the case to the jury, with instructions as follows: "If the defendant, in beating the dogs, was doing a necessary act, or one which was his duty, under the circumstances of the case, to do, and was doing it in a proper way, then he was not responsible in this action, providing he was using ordinary care at the time of the blow. If it was

not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not, as he chose,—the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word 'inevitable' not in a strict, but a popular, sense." "If, however, the plaintiff, when he met the injury, was not in the exercise of ordinary care, he cannot recover; and this rule applies whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant." The jury found a verdict for plaintiff. Defendant alleged exceptions.

J. G. Abbott, for defendant. *B. F. Butler* and *A. W. Farr*, for plaintiff.

SHAW, C. J. This is an action of trespass *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and, the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law by which the action would abate by the death of either party is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. St. c. 93, § 7. The facts set forth in the bill of exceptions preclude the supposition that the blow inflicted by the hand of the defendant upon the person of the plaintiff was intentional. The whole case proceeds on the same assumption, that the damage sustained by the plaintiff from the stick held by the defendant was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than "involuntary," because, in some of the cases, it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case or of trespass. This is very distinguishable from the question whether in a given case any action will lie. The result of these cases is that, if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*,

3 East, 593; *Huggett v. Montgomery*, (Day's Ed.) 2 Bos. & P. (N. R.) 446, and notes. In these discussions, it is frequently stated by the judges that, when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither willful, intentional, nor careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant in driving on the wrong side of the road, in a dark night, which was clearly negligent, if not unlawful. In the course of the argument of that case, (page 595.) **LAWRENCE, J.**, said: "There certainly are cases in the books where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent; and the cases cited by him are perfectly consistent with that supposition. So the same learned judge, in the same case, says (page 597:) "No doubt trespass lies against one who drives a carriage against another, whether done willfully or not." But he immediately adds: "Suppose one who is driving a carriage is negligent, and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? And, if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not willful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85-92; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. 639; Com. Dig. "Battery," A. (Day's Ed.,) and notes; *Vincent v. Stinehour*, 7 Vt. 62. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given, to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term "ordinary care," it may be proper to state that what constitutes ordinary care will vary with the cir-

cumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case requiring a distinction between acts which it was lawful and proper to do and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict, but a popular, sense. This is to

be taken in connection with the charge afterwards given, that, if the jury believed that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant,) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev. § 85; *Powers v. Russell*, 13 Pick. 69, 76; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460.

Perhaps the learned judge, by the use of the term "extraordinary care" in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views as above explained. But we are of opinion that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this: that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then, unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

(See, also, *Stanley v. Powell*, [1891,] 1 Q. B. Div. (N. S.) 86; *Brown v. Collins*, 53 N. H. 442; *Harvey v. Dunlop*, Lator Supp. 193; *Nitro-Glycerine Case*, 15 Wall. 524; *Brown v. Boom Co.*, 109 Pa. St. 57, 1 Atl. Rep. 156; *Lansing v. Stone*, 37 Barb. 15.)

An action upon tort lies for the breach of a right or duty created by law, even though the performance of such right or duty may have been assumed by contract. In such cases the plaintiff may either sue *ex contractu* or *ex delicto*.

(61 Md. 619.)

BALTIMORE CITY PASS. RY. CO. v. KEMP
et ux.

(Court of Appeals of Maryland. July 3, 1884.)

1. NEGLIGENCE — REMOTE CONSEQUENCES—QUESTION FOR JURY.

By the alleged negligence of a railway company, a woman, previously in good health, was injured, while a passenger on its railway, by a blow upon the breast, which thereafter continued to be sore, until, within two or three weeks, a cancer appeared there. There was evidence that such a blow might be sufficient to cause the development of cancer, although the origin of a cancer, in any particular case, cannot be certainly known. *Held*, that the question whether the cancer was the result of the injury was one for the jury, upon the facts. *Jewell v. Railway Co.*, 55 N. H. 84, distinguished. *STONE, J.*, dissenting.

2. SAME—BREACH OF DUTY ARISING FROM CONTRACT—ELECTION OF REMEDY.

A common carrier of passengers owes, to a person accepted to be carried, a duty to be careful, irrespective of contract, the violation of which duty is a tort, giving a right of action; and while a passenger may sue for a breach of contract, where there is one, he may, at his election, proceed as for a tort, where personal injury has been suffered by the negligence or wrongful act of the carrier or his agents.

Motion for reargument of appeal from circuit court, Howard county. See 61 Md. 74.

Action by Charles E. Kemp and Adaline Kemp, his wife, against the Baltimore City Passenger Railway Company, for personal injuries to the wife, alleged to have been caused by the negligence of defendant. Evidence tending to show that a cancer, from which the wife suffered, was the result of the injury, was given at the trial, and its substance was stated, in the opinion of the court on the hearing of the appeal, as follows: "The evidence shows, clearly and without contradiction, that Mrs. Kemp was, at the time of the accident, and for many years prior thereto, apparently in good health and condition. The accident occurred about the middle of May, 1880, and a very short time thereafter the cancer commenced its development on the injured part of her person. In her testimony, after describing the manner in which the accident occurred, and how she was thrown against the railing on the platform of the car, as she was about getting off, and the hurting of her right arm and left breast, she states that the right arm was bruised and discolored; and where the breast was struck it was sore, and remained so from that time out. Prior to that time she had no pain or soreness; and two or three weeks afterwards a small lump appeared in the left breast, which, upon being shown to her physicians, was pronounced to be a cancer. Dr. Smith first operated for its removal on the 8th of November, 1880, when it was about the size of an orange, and he operated again about the 12th of January,

1881, when the entire breast was removed, but without success in extirpating the roots of the disease. The cancer still remains, and is pronounced to be incurable. The two daughters of Mrs. Kemp, in their testimony, fully corroborate the statement of their mother in regard to her previous good health, and apparent freedom from disease, and the subsequent appearance and growth of the cancer. And the professional witnesses, while they all testify that it is impossible to know and be certain as to the origin of cancer in any given case, yet they all agree in saying that the blow, such as that described by Mrs. Kemp, was sufficient and may have been the cause of the development of cancer in her case. In the opinion of two of the physicians, Dr. Latimer and Dr. Turner, the blow on the breast, as described by Mrs. Kemp, was not only sufficient cause for the production of the cancer, but that they would attribute the cancer to that cause; and, from the coincidences of the case, we must say that their opinion does not appear to be unreasonable."

Defendant offered prayer for instructions to the jury, one of which was as follows: "That there is no legally sufficient evidence that the cancer, testified to by the witnesses in this case, was caused by the negligence of the defendant or its servants, and therefore the jury cannot take the same into consideration in estimating the damage done to the plaintiff Mrs. Kemp by the negligence of the defendant or its servants, even if they shall find that there was such negligence." This the court rejected, and granted the plaintiff's prayer for instructions, and defendant excepted. The jury found a verdict for plaintiff for \$10,000, and judgment for plaintiff was entered thereon. Defendant appealed from the judgment. On the hearing of the appeal, the court rendered an opinion affirming the judgment. Thereafter defendant moved for a reargument of the appeal.

Bernard Carter and Arthur W. Machen, for the motion.

ALVEY, C. J. There has been a motion made in this case for reargument, based largely upon authorities that were not brought to the attention of the court on the former hearing, and hence we depart from the general practice of disposing of such motions without the formal assignment of reasons for the action of the court thereon.

Upon the question whether the jury should have been allowed to infer, upon the evidence before them, that cancer was the result of the injury received by the plaintiff, the defendant cites and relies upon the case of *Jewell v. Railway Co.*, 55 N. H. 84, a case not referred to on the former argument. But the facts of that case are so entirely different from those of the case before us that the analogy between the

two cases is but slight. In the first place, the party whose negligence caused the injury in that case was not, according to the decision of the court, the servant or employe of the defendant, and therefore the defendant was not liable for his acts. In the second place, there was a considerable length of time intervening between the time of the accident and the death of the party, the latter in the mean time being engaged in hard work, and subjected to much exposure, and all the circumstances of the case rendered it exceedingly doubtful whether there could be any connection between the injury received by a blow on the right shoulder, and a cancer that was found to exist, by *post mortem* examination, in the left lung of the party, a year and a half after the injury received. And the physicians all testified that, in their opinion, neither the last sickness of the party nor the cancer was in any way attributable to the injury previously received. The court, moreover, considered and determined the case upon the weight of evidence, as upon motion for a new trial, and not as upon a demurrer to the legal sufficiency of the evidence to be submitted to the jury, as in the case before us. The other cases cited upon this question have only a remote or indirect bearing, and we do not perceive that they are at all in conflict with the opinion that has been delivered in this case.

Since the opinion in this case was delivered, 50 Mich. has been published, and that volume contains the case of *Beauchamp v. Mining Co.*, at page 163. In that case a boy, while passing on a highway, was injured by being struck on the side of his head by a stone from a blast fired by the mining company, and, having died some five or six months thereafter, an action was brought to recover damages for his death, caused, as it was alleged, by the negligence of the defendant. Among other defenses, it was alleged, and evidence was given to show, that death was not caused by the injury, but by specific or typical pneumonia; and the case was sought to be taken from the jury upon the ground that pneumonia, and not the injury received from the stone, was the direct and proximate cause of the death. The physician who attended the boy in his sickness testified that he died of pneumonia, though he had been very seriously injured, and was paralyzed on one side, and the chances of recovery were against him. The doctor said in his testimony: "I am unprepared to say what caused pneumonia in this case. In my opinion, it was a specific or typical pneumonia; the relation between it and the injured head was not close." It was contended, however, for the plaintiff, that, owing to the broken and shattered condition of the boy's system, caused by the injury received, and his increased susceptibility to cold, pneumonia was superinduced and developed as a natural result of the injury; and that question was submitted to the jury upon the evidence, and they found for the plaintiff. The case was taken to the supreme court of Michigan, and the error assigned was the submission of the question to and allowing the jury to conclude as to whether

pneumonia did in fact result from and was a consequence of the injury received by the boy. The supreme court affirmed the ruling of the court below, and held that, "if the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor." And so in this case: If the injury received by Mrs. Kemp, by the negligence of the defendant, superinduced and contributed to the production or development of cancer, the defendant is responsible therefor; and the cancer is not to be treated as an independent cause of injury or suffering, any more than pneumonia, resulting from an injury that rendered the system susceptible of and liable to the attack, as a natural consequence of such injury, is to be regarded as an independent cause of death. In both cases the original injury was the prime cause that opened the way to and set other causes in motion, which led to the fatal results. And the wrong-doer cannot be allowed to apportion the measure of his responsibility to the initial cause. Whether the direct causal connections exist is a question, in all cases, for the jury, upon the facts in proof.

There is another ground upon which re-argument of the case is asked, and that is with respect to the nature of the action, and for what nature and extent of injury damages may be allowed to be recovered therein. The defendant insists that, while the form of action is as for a tort, yet the real ground of the right to recover in this case is simply for breach of the contract to carry safely, and to put the party down safely. And that being so, according to the contention, it is insisted that, to entitle the plaintiff to damages by reason of a breach of the contract, the injury for which compensation is asked should be shown to be such that it may fairly be taken to have been contemplated by the parties as the possible result of the breach of the contract; and that, in this case, no such consequence as the production of cancer in the plaintiff could have been anticipated as the probable result of the negligent act of the defendant. But to this proposition we cannot agree, and, in our opinion, it is not supported by authority.

A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the *gravamen* of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common-law duty to carry safely; and the negligent violation of that duty, to the damage of the plaintiff, is a tort or wrong which gives rise to the right of action. *Bretherton v. Wood*, 3 Brod. & B. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the com-

mission of the wrong; whereas, in the case of a passenger, if the contention of the defendant be supported, for the same character of injury, the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare had been paid by the master, or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both servant and the child are passengers, and for any personal injuries suffered by them, through the negligence of the carrier, it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question.

In the case of *Marshall v. Railroad Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, JERVIS, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." And in the same case Mr. Justice WILLIAMS said: "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole

current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Adol. & E. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carrier." And in the subsequent case of *Austin v. Railway Co.*, L. R. 2 Q. B. 442, Mr. Justice BLACKBURN, now Lord BLACKBURN, in delivering his judgment in that case, said: "I think that what was said in the case of *Marshall v. Railroad Co.*, 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect, and with full approval of the authorities just cited, are the cases of *Foulkes v. Railway Co.*, 4 C. P. Div. 267, and the same case on appeal, 5 C. P. Div. 157, and *Fleming v. Railway Co.*, 4 Q. B. Div. 81. The case of *Bretherton v. Wood*, 3 Brod. & B. 54, is a direct authority upon the question.

A passenger may, without doubt, declare for a breach of contract, where there is one; but it is at his election to proceed as for a tort, where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and, in such action, the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. And this is the settled doctrine and practice in this state. *Stockton v. Frey*, 4 Gill, 406; *Railroad Co. v. Blocher*, 27 Md. 277, 287; *Turnpike Road v. Boone*, 45 Md. 344; *Stokes v. Saltonstall*, 13 Pet. 181. The motion for reargument must be overruled.

STONE, J., dissented.

(See, also, *Railroad Co. v. Pumphrey*, 59 Md. 390; *Boorman v. Brown*, 3 Q. B. 511, 11 Clark & F. 1; *Wheeler v. Navigation Co.*, 125 N. Y. 155, 162, 26 N. E. Rep. 248.)

So a tort, as a violation of legal duty, may involve, as one of its elements, a breach of contract.

(87 N. Y. 382.)

RICH v. NEW YORK CENT. & H. R. R. CO.

(*Court of Appeals of New York*. Jan. 17, 1882.)

1. TORT INVOLVING BREACH OF CONTRACT.

An omission to perform a contract obligation may constitute a tort, where that omission is also an omission of a legal duty; and such legal duty may arise, not merely out of relations of trust and confidence inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract, as such, although connected with it and dependent upon it. The duty and the tort grow out of the entire range of facts, of which the breach of contract is but one.

2. SAME—FRAUD—EVIDENCE.

The complaint, in an action against a railroad company, alleged, in substance, that land owned by plaintiff, very valuable, but heavily mortgaged, had greatly depreciated in value in consequence of the removal of defendant's depot from the vicinity, and could only be restored to some-

thing like its former value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site; that, to secure this result, plaintiff surrendered valuable riparian rights to defendant, upon its agreement to restore the depot as soon as practicable; but that, because of plaintiff's refusal to consent, without compensation for damages, to the closing of a street, which would have greatly injured his property, defendant, fully understanding plaintiff's situation, maliciously and willfully broke its agreement, and delayed a restoration of the depot, for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure, and instigated a sale by the mortgagee under the foreclosure decree, at which the property was bid off by the mortgagee for a comparatively small sum; and thereupon the street was closed, the mortgagee having been induced to waive all damages therefor, and the depot was restored. At the trial, it was conceded that a good cause of action, sounding in tort, was stated in the complaint. *Held*, that one separate and distinct unlawful act was

alleged, being the unreasonable delay in restoring the depot to its original location, which was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff; that the tort pleaded was an actual and affirmative fraud,—an alleged scheme to accomplish a lawful purpose by unlawful means.—the breach of contract being only one of the elements which constituted the tort; and that it was error to exclude, as immaterial, evidence offered by plaintiff to prove the agreement to restore the depot, and its breach, the situation of the parties in respect of their several properties, the existence of the mortgage, and the instigation of the foreclosure by defendant, and statements by defendant's officers as to their reasons for refusing to restore the depot.

Appeal from supreme court, general term, second department.

Action by Josiah Rich against the New York Central & Hudson River Railroad Company. The complaint alleged, in substance, that about the year 1850 plaintiff, with others who were the owners of certain lands in the village of Yonkers, entered into an agreement with the Hudson River Railroad Company to convey to said corporation a site for its depot, and fill in the same, and lay out and grade their lands so as to give convenient communication between the depot and the business portion of said village, said company agreeing to pay the actual cost of filling in the depot site, and to erect and ever after maintain its depot thereon; that said agreement was carried out, the site conveyed, and the depot erected; that defendant succeeded to the rights, franchises, and obligations of said Hudson River Railroad Company, and plaintiff acquired the titles of the other owners of said remaining lands; that there was a navigable inlet crossed by said railroad, known as the "Nepperhan" or "Saw-Mill" river; that said Hudson River Railroad Company, having no right to cut off or obstruct the navigation in said inlet, had constructed and maintained a draw-bridge over it; that it subsequently procured the passage of an act of the legislature, authorizing it to bridge said inlet without an opening or draw, on making compensation to the riparian owners; that defendant, to avoid the payment of such compensation, "resolved to accomplish the same object by artifice and strategy," and so threatened said riparian owners that, unless they would surrender their rights, and consent to the construction of such bridge, it would remove its depot, and, upon said owners refusing so to do, did remove its depot to a point above a third of a mile north; that plaintiff, a short time previous to the threatened removal, had borrowed, on his bond secured by mortgage on his said lands, the sum of \$35,000, most of which was expended in erecting stores on his said lands, directly opposite and about 100 feet south of said depot, and, if the depot had not been removed, could have rented said stores and the adjacent lots for \$5,000 per annum, and could have sold other lots for sufficient to pay off said mortgage, but that in consequence of such removal his premises became wholly unproductive and unsalable; that, in order to have the depot restored to its original site and to save his property from be-

ing sacrificed, he was induced and coerced into giving his consent to the closing of said draw-bridge, and an agreement was entered into on March 7, 1877, by which defendant, in consideration of such consent, agreed that it would, "as soon as practicable, and within a reasonable time, build and forever thereafter maintain its principal passenger depot for Yonkers" upon said original site; that defendant thereupon removed the draw-bridge, and erected a permanent bridge over the inlet; that it also erected a new depot on the old site, and had the same ready for use about April 15, 1878, but absolutely refused to open or establish its depot there unless the common council of Yonkers would pass an ordinance declaring and ordering the closing of a portion of a street which crossed its tracks, so that it could build a fence inclosing said tracks, which would so exclude the plaintiff and others from the right and privilege of crossing said tracks to the steam-boat docks on the Hudson river; that defendant procured the passage of an act of the legislature amending the charter of Yonkers so as to provide for the assessment and payment of damages claimed by the owners of land injuriously affected by the closing of a street; that the closing of said street would have damaged plaintiff's property to, at least, the sum of \$50,000, and would have neutralized, in great measure, all the benefits derived from the restoration of the depot; that plaintiff and others sent in remonstrances to the common council against such discontinuance, and it refused to pass an ordinance to that effect, because of the large amount of damages the city would have to pay; that, upon such refusal being made known, defendant's officers publicly asserted that it would never open said new depot until said ordinance was passed, and would tear down the new depot, or use it exclusively for freight, "in all of which the defendant was actuated by malice and vindictiveness towards plaintiff, and a design to crush, ruin, and destroy him;" that in consequence of the removal of the depot, and the consequent unproductiveness of plaintiff's property, he was unable to pay the interest on said bond and mortgage, and foreclosure was commenced, and a decree of foreclosure and sale was made, but that the mortgagee had foreborne selling to give plaintiff the benefit of the re-establishment of the depot; that defendant's officers and agents, after the refusal of the common council to pass the said ordinance, called upon the mortgagee, and induced it "to withdraw the grace and favor" accorded to plaintiff and to advertise the property immediately for sale, so as to cut off plaintiff's claim for damages, the mortgagee having been induced to waive any such claim; that the "scheme or plan which had been so concocted and arranged by and in the interest and for the special benefit and advantage of the defendant, to enable it to evade and violate with impunity its aforesaid covenant and obligation with the plaintiff, * * * and to escape the payment of its fair and just proportion of the plaintiff's damages

on the closing of said street, was fully carried out and executed by the instigation and connivance of the defendant;" that plaintiff's entire property was sold under said decree, and bid off by the mortgagee for \$20,000, and thereupon the ordinance was passed closing said street, and defendant immediately opened the new depot; and that "defendant, by means of the wrongs, injuries, and grievances aforesaid, and its malicious and unlawful actions in doing as aforesaid, has inflicted pecuniary loss and damage upon the plaintiff to the amount of \$150,000;" for which sum judgment was asked.

At the trial plaintiff offered in evidence the agreement of 1877, which was objected to and excluded as irrelevant and incompetent. Plaintiff also offered to show the alleged breach of that contract, the value of the property conveyed to defendant, and the establishment of the depot originally thereon; that defendant caused and procured the sale of defendant's property under the foreclosure decree to deprive him of his claim for damages for closing the street; that it was sold for less than one-fifth of its value; that plaintiff was dispossessed at the instigation of defendant; and that if the depot had been re-established the market value of the property would have been largely increased. Plaintiff also offered to prove an interview with defendant's officers in reference to the removal and re-establishment of the depot, and the reasons they assigned for the removal and refusal to restore it, and also the amount of damage sustained by plaintiff in consequence of defendant's omission and refusal to re-establish the depot under the agreement of 1877, all of which was objected to and excluded on the same ground.

Defendant moved for a dismissal of the complaint on the following grounds: "First. Because the plaintiff has not laid the foundation, by any of the several agreements in evidence, to sustain a cause of action for damages arising from any wrongful act of the defendant in respect to the property of the plaintiff. Second. Because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts. The proof offered fails to make out any cause of action as set forth in the complaint, and would not sustain any verdict against the defendant for any damages in this action. Third. Because the complaint sets forth but a single cause of action, and the plaintiff cannot legally found a claim for damages upon the alleged breach of any one of the several agreements or contracts referred to."

The motion was granted, and judgment for defendant was entered on the dismissal of the complaint, which, on appeal therefrom by plaintiff, was affirmed by the general term. Plaintiff appealed from the judgment of the general term.

R. W. Van Pelt, for appellant. William Allen Butler, for respondent.

any accurate and perfect definition of a "tort." Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a "borderland," where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. Moak's Underh. Torts, 23. The text-writers either avoid a definition entirely, (Addison on Torts;) or frame one plainly imperfect, (2 Bouv. Law Dict. 600;) or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes, (Cooley, Torts, 3, note 1; Moak's Underh. Torts, 4; 1 Hil. Torts, 1.) By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with, a contract, (2 Bouvier, supra;) and that precisely the same state of facts between the same parties may admit of an action either *ex contractu* or *ex delicto*, (Cooley, Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of, the contract; for if the latter imposes the legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Add. Torts, 13. Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties, respectively, would have a remedy, but none of which created any such rights as to lay the foundation for a charge of willful misconduct or any other tortious act. Upon this theory, the case

was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and therefore something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint, the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff and the railroad company, and conceding, what seems probable, that the evidence relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong, there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers that, to secure this result, the plaintiff has surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and willfully broke its agreement, and delayed a restoration of the depot, for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure, and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time the plaintiff had a cause of action. But that was not the one with which he came into court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was it is quite necessary to know, and in what respect and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

That a good cause of action, sounding in tort, was stated in the complaint was not denied upon the trial. Neither by demurrer nor by motion was the sufficiency of the complaint in any manner assailed. The second ground upon which a nonsuit was asked practically confessed that there was a good cause of action, but merely a failure to prove it. The ground stated was "because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts, but the proof offered fails to make out any cause of action as set forth in the complaint." The opinion of the general term distinctly concedes the

point, saying that the facts alleged made out "a clear case of fraud." And on the present appeal the learned counsel for the respondent explicitly admits, in his brief, that it was competent for the plaintiff, under the issue of fact joined by the pleadings, to give evidence of any of the alleged wrongful acts charged in the complaint, as a basis for the claim of damages which he asserted. There was therefore something to try,—something which was susceptible of proof; a tortious act or omission, or a series of such acts or omissions, properly alleged in the complaint, and open to the plaintiff's evidence. Why he was not permitted to have a single one of the 40 questions put to his witnesses answered becomes, now, the important inquiry. It will not be necessary to consider them all, for many were excluded for a defect in their form, or because totally immaterial, or in the exercise of the proper discretion as to the order of proof, but enough remain, and may be grouped together, to raise the serious question argued at the bar.

The plaintiff offered to show the agreement of March, 1877, between himself and the railroad company, for the restoration of the depot to its original site within a reasonable time, and the breach of that agreement by the defendant company. The objection, put upon the ground that the offered proof was irrelevant and incompetent, was sustained, and the evidence excluded. The plaintiff then sought to show how long a time elapsed, after the execution of the contract, before the depot was re-established at the foot of Main street; whether an interval did occur, and how much time elapsed from the date of the contract to the building of the new depot,—which evidence was also excluded as immaterial. A series of questions were further put, to show what the defendant did, if anything, in and about procuring plaintiff's mortgaged property to be sold and sacrificed under the mortgage; when the foreclosure took place; at whose instigation; and at what price, compared with its real value, the property was sold. These questions were excluded. The plaintiff also attempted to show that the re-establishment of the depot at the foot of Main street would have largely increased the value of his adjoining property covered by the mortgage. That evidence was rejected. The plaintiff was then asked if he had an interview with the officers of the defendant in reference to the removal and the re-establishment of the depot. This question was objected to, and the only ground assigned was, "as it is in writing." No proof of that was given. The case shows nothing but the assertion of the party objecting, and thereupon the witness was not permitted to answer the inquiry whether he had an interview at all. He was then asked what reasons they assigned for removing the depot, and refusing to bring it back, and this was excluded. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

The exclusion of proof of the contract for re-establishing the depot, and the willful and intended breach of that contract, bring up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and therefore some unlawful act or omission. Cooley, Torts, 60. Whatever, or how numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail. They merely heap up epithets, unless the purpose intended or the means by which it was to be accomplished are shown to be unlawful. *O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261. The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate act, may have been unkind, or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do it was not unlawful to ask it to do. The act of instigating the sale may be material, and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. *Randall v. Hazelton*, 12 Allen, 412. We are forced back, therefore, to the contract for re-establishing the depot, and its breach, as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that, unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established, to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that, upon a breach of the contract, there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused. There is constructive fraud, or a negligence that operates as such; and it is that fraud and

that negligence which, at bottom, make the breach of contract actionable as a tort. *Coggs v. Bernard*, 2 *Ld. Raym.* 909; *Orange Bank v. Brown*, 3 *Wend.* 161, 162.

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The general term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relations existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substituted a solid bridge. With the growth of its business and the multitudes of its trains the draw had become a very great evil and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering, from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation that it could and did shut off the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong, on the part of the defendant. If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not, as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: the railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This, in itself, was a perfectly law-

ful purpose. The grade crossing was a death trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages by a complete sacrifice of his property. That plan was executed in this manner: The company willfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full considerations of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee towards a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from a violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud,—an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that, and outside of that, there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of re-

sistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time and circumstances and conditions; so interwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate,—as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the case referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation of an injury rests, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. *Kerwhaker v. Railroad Co.*, 3 Ohio St. 188. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the frame-work of organized society. It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts, of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that, "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit, was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mortgagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 83. Nor is it a difficulty that the injury suffered was the result of a series of acts, some of which were lawful and innocent. *Cooley, Torts*, 70; *Bebinger v. Sweet*, 1 Abb. N. C. 263.

Assuming, now, that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause

of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case, a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract, and its breach, of the delay in restoring of the depot, and the reasons therefor, were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale, were elements of the transaction proper to be shown. The plaintiff's interview with the officers of the defendant company, and their statement of the reasons for refusing

to restore the depot, were improperly excluded. While we cannot know what it was which actually occurred, it is very plain that their statement of reasons would bear materially upon the issues involved. We are not concerned with the question of the wisdom of the plaintiff's choice of his form of action, or of what may result if the cause of action pleaded as a tort shall be hereafter assailed, instead of its sufficiency being conceded. It may well be that he has chosen the one most difficult to maintain, and that an action upon one or more of the contracts would be less surrounded by difficulties. But we have nothing to do with his choice. He is entitled to prove his cause of action if he can. The judgment should be reversed, and a new trial granted, cost to abide the event. All concur, except RAPALLO and MILLER, JJ., not voting. Judgment reversed.

In cases of contract, where no legal duty arises independent of contract, one not in privity with the defendant cannot recover against him in tort.

(10 Mees. & W. 109.)

WINTERBOTTOM v. WRIGHT.

(Court of Exchequer. June 6, 1842.)

CONTRACTOR'S LIABILITY FOR INJURY TO THIRD PERSON—PRIVITY.

Defendant contracted with the postmaster general to provide a mail-coach to convey the mail between two places, and other persons contracted to supply horses and coachmen for the same purpose, and hired plaintiff to drive the coach. Plaintiff, while driving the coach, was injured by its breaking down from latent defects in its construction. *Held*, that plaintiff could not maintain an action against defendant for such injury, there being no privity of contract between them.

Demurrer to pleas.

Action on the case. The declaration stated that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward, with the postmaster general, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead; that the defendant, under and by virtue of the said contract, had agreed with the said postmaster general that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to-wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to-wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid; that Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the postmaster gen-

eral to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretense whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the postmaster general; that the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and while the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the postmaster general, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to-wit, on the 8th of August, 1840, while the plaintiff, as such mail-coachman, so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach being a mail-coach, found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to-wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter, or

thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life. To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but, as the court gave no opinion as to their validity, it is not necessary to state them.

Mr. Peacock, in support of the demurrers, argued against the sufficiency of the pleas.

Mr. Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the postmaster general, and totally unconnected with them or with the plaintiff. Now, it is a general rule that, wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue. *Tollir v. Sherstone*, 5 Mees. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them, and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle. So, if the chain cable of an East Indiaman were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron. Again, suppose a gentleman's coachman were injured by the breaking down of his carriage, if this action be maintainable, he might bring his action against the smith or the coachmaker, although he could not sue his master, who is the party contracting with him. *Priestley v. Fowler*, 3 Mees. & W. 1. There is no precedent to be found of such a declaration, except one in 8 Wentworth, Pleading, 397, which has been deemed very questionable. *Rapson v. Cubitt*, 9 Mees. & W. 710, is an authority to show that the party injured by the negligence of another cannot go beyond the party who did the injury, unless he can establish that the latter stood in the relation of a servant to the party sued. In *Witte v. Hagne*, 2 Dowl. & R. 33, where the plaintiff sued for an injury produced by the explosion of a steam-engine boiler, the defendant was personally present managing the boiler at the time of the accident. *Levy v. Langridge*, 4 Mees. & W. 337, will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him.

Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff. There, moreover, fraud was alleged in the declaration, and found by the jury, and there, too, the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

Mr. Peacock, contra.

This case is within the principle of the decision in *Levy v. Langridge*, 4 Mees. & W. 337. Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier. There it is clear that the use of the weapon by a soldier would have been contemplated, although not by the particular individual who received the injury; and could it be said, since the decision in *Levy v. Langridge*, that he could not maintain an action against the contractor? So, if a coach-maker, employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a work-house, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter, was injured by the falling of a stone, he could not maintain action against any other person than the contractor, but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the postmaster general. *Hall v. Smith*, 2 Bing. 156; *Humphreys v. Mears*, 1 Man. & R. 187; *Priestley v. Fowler*, 3 Mees. & W. 1. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [ALDERSON, B.: The decision in *Levy v. Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which is false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken in the judgment of this court in the case of *Levy v. Langridge*, 4 Mees. & W. 337, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person, and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such action, there certainly would have been some precedent of it; but, with the exception of actions against innkeepers and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is, however, contended that, this contract being made on the behalf of the public by the postmaster general, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence,—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. These, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but, unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus a carrier may be sued either in *assumpsit* or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract. If he could have done so, what would have been his situation, supposing the post-

master general had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice: that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B. I am of the same opinion. The contract in this case was made with the postmaster general alone; and the case is just the same as if he had come to the defendant, and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the action is that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy v. Langridge*. But the principle of that case was simply this: that, the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff. The falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

GURNEY, B., concurred.

ROLFE, B. The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and, when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to-wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and during all the time aforesaid it had become and was the sole and exclusive duty of the defendant, to-wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the postmaster general be meant, that is true; but if a duty to the plaintiff be intended, (and in that sense the word is evidently used,) there was none. This is one of those unfortunate cases in which there

certainly has been *damnum*, but it is *damnum absque injuria*. It is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant

(See, also, *Losee v. Clute*, 51 N. Y. 494; *Longmeid v. Holliday*, 6 Exch. 767; *Carter v. Harden*, 18 Me. 528, 7 Atl. Rep. 392.)

But if, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.

(6 N. Y. 397.)

THOMAS *et al.* v. WINCHESTER.

(*Court of Appeals of New York*. July, 1852.)

BREACH OF CONTRACT INVOLVING VIOLATION OF
LEGAL DUTY TO THIRD PERSONS—PRIVITY.

Defendant, a manufacturer of and dealer in vegetable extracts for medicinal purposes, labeled and sold, as extract of dandelion, which is a harmless medicine, extract of belladonna, a poison, resembling in appearance the extract of dandelion; and, after it had passed through the hands of other dealers, a portion of it was sold and administered, as extract of dandelion, to a patient, who was seriously injured thereby. *Held*, that defendant was liable in damages to the person so injured, although there was no privity between them, on the ground of a breach of the duty arising out of the nature of defendant's business and the danger to others incident to its mismanagement.

Appeal from supreme court, general term, sixth district.

Action by Samuel Thomas and Mary Ann Thomas, his wife, against the defendants, Winchester and Gilbert, for injuries to the plaintiff Mrs. Thomas, alleged to have been caused by the negligence of defendants. At the trial a verdict was rendered for plaintiffs against the defendant Winchester only, the defendant Gilbert having been acquitted by direction of the judge. A motion by defendant Winchester for a new trial was denied, and judgment for plaintiffs was entered on the verdict. Defendant Winchester appealed from the judgment.

Charles P. Kirkland, for appellant. *N. Hill, Jr.*, for respondents.

RUGGLES, C. J. This is an action brought to recover damages from the defendant for negligently putting up, labeling, and selling, as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc. The facts proved were briefly these: Mrs. Thomas being in ill health, her physicians prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs reside. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very

alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labeled, " $\frac{1}{2}$ lb. dandelion, prepared by A. Gilbert, No. 108 John street, N. Y.; jar, 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labeled alike. Both were labeled like the jar in question, "as prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary as an assistant in his business. The jars were labeled in Gilbert's name, because he had been previously engaged in the same business on his own account at No. 108 John street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste; but may, on careful examination, be distinguished, the one from the other, by those who are well acquainted with those articles. Gilbert's labels were paid for by Winchester, and used in his business, with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds: (1) That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction, or privity between him and the plaintiffs, or either of them. (2) That this action sought to

charge the defendant with the consequences of the negligence of Aspinwall and Foord. (3) That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action. (4) That, according to the testimony, Foord was chargeable with negligence, and that the plaintiffs, therefore, could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only. (5) That this suit being brought for the benefit of the wife, and alleging her as the meritorious cause of action, cannot be sustained. (6) That there was not sufficient evidence of negligence in the defendant to go to the jury. The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending, as and for dandelion, the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant, and sold by him to Aspinwall, and by Aspinwall to Foord. That, if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife. The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife, and the case was left to the jury with the proper directions on that point. 1 Chit. Pl. (Ed. of 1828) 62.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained. If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon, and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse. It was a duty which the smith owed to him alone, and to no one else. And, although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. This was the ground on which the case of *Winterbottom v. Wright*, 10 Mees. & W. 109, was decided. A. contracted with the postmaster general to provide a coach to convey the mail-bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down. The plaintiff was thrown from his seat, and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron ROLFE: A.'s duty to keep the coach in good condition was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and inevitable consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 Rev. St. p. 662, § 19. A chemist who negligently sells laudanum in a phial labeled as paregoric, and thereby causes the death of a person to whom it was administered, is guilty of manslaughter. *Tessymond's Case*, 1 Lewin, Cr. Cas. 169. "So highly does the law value human life that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another." *Regina v. Swindall*, 2 Car. & K. 232, 233. And this rule applies, not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. *Regina v. Haines*, 1d. 368, 371. Although the defendant, Winchester, may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained

of, the case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution, or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall, as an article of merchandise, to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 *Adol. & E. (N. S.)* 29; *Illidge v. Goodwin*, 5 *Car. & P.* 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. *Dixon v. Bell*, 5 *Maule & S.* 198.

The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label. In *Longmeid v. Holliday*, 6 *Law & Eq. Rep.* 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable

only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant on the trial insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label, and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant, and left the question of their negligence to the jury, who found on that point for the plaintiffs. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been "prepared" by his agent, Gilbert. The word "prepared" on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defense that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna, without a label indicating that it was a poison, was declared a misdemeanor by statute, (2 *Rev. St.* p. 694, § 25, [23;]) but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by RUGGLES, C. J.

Judgment affirmed.

(See, also, *Devlin v. Smith*, 89 *N. Y.* 470; *Kelly v. Howell*, 41 *Ohio St.* 438; *Heaven v. Pender*, 11 *Q. B. Div.* 503; *Van Winkle v. Boiler Co.*, 52 *N. J. Law*, 240, 19 *Atl. Rep.* 472; *Langridge v. Levy*, 2 *Mees. & W.* 519, 4 *Mees. & W.* 337.)

In actions of tort against joint tort-feasors, the damages will not be apportioned.

(14 R. I. 175.)

KEEGAN v. HAYDEN *et al.*

(*Supreme Court of Rhode Island.* May 31, 1883.)

JOINT TRESPASSERS—APPORTIONMENT OF DAMAGES.

On a verdict for plaintiff, in an action for assault and battery and false imprisonment against several defendants, the damages are properly assessed jointly against all, without discrimination between the defendants.

Petition for a new trial.

Action of trespass by Lawrence Keegan against William F. Hayden and others. The jury found a verdict against all the defendants. Defendants petitioned for a new trial.

Nicholas Van Slyck and Stephen A. Cooke, Jr., City Sols., for defendants. Charles E. Gorman and John Palmer, for plaintiff.

DURFEE, C. J. This is a petition for the new trial of an action of trespass against three several defendants for assault and battery and false imprisonment. The defendants pleaded jointly—*First*, the general issue; and, *second*, a special plea in justification that they were police constables of the city of Providence, and as such arrested the plaintiff for intoxication in the public streets of said city, and detained him for trial, the said arrest and detention being the trespasses complained of. The jury on trial returned a verdict for the plaintiff against them all jointly for \$500. One of the grounds assigned for new

trial is that the jury did not discriminate between the defendants, but assessed them all jointly for the full amount of the damages. We do not find any error in this. The rule is that, in an action of tort against several who are jointly charged, the verdict ought to be rendered against all who are proved guilty as charged, without any apportionment of the damages, each and all of them being alike liable for the wrong to the fullest extent, in whatever different degrees they may have contributed to it. *Hill v. Goodchild*, 5 Burrows, 2790; *Hume v. Oldacre*, 1 Starkie, 351; *Berry v. Fletcher*, 1 Dill, 67, 71; *Sprague v. Kneeland*, 12 Wend. 161; *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Metc. (Mass.) 503; *Currier v. Swan*, 63 Me. 323; *Clark v. Bales*, 15 Ark. 452; *Hair v. Little*, 28 Ala. 236; *Bell v. Morrison*, 27 Miss. 68; *Beal v. Finch*, 11 N. Y. 128. The defendants also ask for a new trial because the verdict is against the evidence, and the weight thereof, and because the damages are excessive. The evidence is conflicting, but we are not prepared to set the verdict aside for the first of these two reasons. We think, however, that the damages are excessive, for, according to the evidence, the peace of the street had been disturbed, and the plaintiff, if not indecently drunk, had been drinking enough to make him excitable and abusive. A new trial will therefore be granted, unless the verdict is reduced to \$300.

(See, also, *Post v. Stockwell*, 34 Hun, 373; *Huddleston v. West Bellevue*, 111 Pa. St. 110, 2 Atl. Rep. 200.)

In general, no right of contribution exists between joint tort-feasors.

(66 Pa. St. 218.)

ARMSTRONG COUNTY v. CLARION COUNTY.

(*Supreme Court of Pennsylvania.* Jan. 3, 1870.)

JOINT WRONG-DOERS—CONTRIBUTION.

A person injured by the breaking down of a public bridge over a stream forming the dividing line between two counties, which was maintained and kept in repair at the joint and equal expense of both, recovered damages for his injuries against one of the counties, which it paid. *Held*, that said county could recover from the other county the latter's proportion of such payment. The rule that there is no contribution between joint tort-feasors is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

Error to court of common pleas, Clarion county.

Action of *assumpsit* by Armstrong county against Clarion county for contribution of a proportion of a judgment recovered against and paid by the former county. At the trial, on motion of defendant, the court directed a nonsuit. This plaintiff assigned for error.

Argued before THOMPSON, C. J., and READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ.

F. Mechling, G. W. Lathey, and D. Bar-

clay, for plaintiff in error. *W. L. Corbett*, for defendant in error.

READ, J. The bridge across Red Bank creek, between the counties of Armstrong and Clarion, at the place known as the "Rockport Mills," was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. While John A. Humphreys was crossing the bridge it fell, and he was severely injured. He brought suit for damages against the county of Armstrong, and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error, (56 Pa. St. 204;) and upon a second trial there was a verdict for the plaintiff for \$1,100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrong-doers cannot have contribution from the other. The commissioners of the two counties had examined the bridge in the summer, and ordered some repairs, which were made. There

can be little doubt that morally Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county; and the question is, does not the law make the moral obligation a legal one? *Merryweather v. Nixan*, 8 Term R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In *Colburn v. Patmore*, 1 Cramp. M. & R. 73, the proprietor of a newspaper who, for a libel published in it, was subjected to a criminal information, convicted, and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance. Lord LYNCHURST said: "I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." So in *Arnold v. Clifford*, 2 Sum. 238, it was held a promise to indemnify the publisher of a libel is void. "No one," said Judge STORY, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice." In *Miller v. Fenton*, 11 Paige, 18, the wrong-doers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution between criminals. In the case of Attorney General v. Wilson, 4 Jur. 1174, cited in the above case by the chancellor, and also reported in 1 Craig & P. 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord COTTENHAM said: "In cases of this kind, where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of." *Seddon v. Connell*, 10 Sim. 81, is to the same effect. In *Story on Partnership*, (section 220,) after speaking of the general rule that there is no contribution between joint wrong-doers, the author says: "But the rule is to be understood according to its true sense and meaning, which is where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction or inference of law. In the latter case, although not in the former, there may be, and properly is, a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not." The case of *Adamson v. Jarvis*, cited by the learned commentators, is in 4 Bing. 66, in which Lord Chief Justice BEST, after noticing *Merryweather v. Nixan*, says: "The case of *Philips v. Biggs*, Hardr. 164, [which was on the equity side of the exchequer] was never decided; but the court of chan-

cery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." From the inclination of the court in this last case, and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act." In *Betts v. Gibbins*, 2 Adol. & E. 57, Lord DENMAN said: "The case of *Merryweather v. Nixan*, 8 Term R. 186, seems to me to have been strained beyond what the decision will bear. The present case is an exception to the general rule. The general rule is that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and *Merryweather v. Nixan*, 8 Term R. 186, was only a refusal of a rule nisi." In *Adamson v. Jarvis*, 4 Bing. 66, we have the observations of a learned person familiar with commercial law." A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154. In *Pearson v. Skelton*, 1 Mees. & W. 504, where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there is no contribution between joint tort-feasors does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. The same doctrine was maintained in *Wooley v. Batte*, 2 Car. & P. 417. These cases have been followed in this court in *Horbach's Adm'rs v. Elder*, 18 Pa. St. 33. "Here," said Judge COULTER, "the plaintiff and defendant are *in equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share." "Contribution," says Lord Chief Baron EYRE, in *Dering v. Earl of Winchelsea*, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract." These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure, and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one, having paid the whole of the damages, is entitled to contribution from the other.

Judgment reversed, and *venire de novo* awarded.

ASSAULT AND BATTERY.

Nature of an assault—Difference between a civil and a criminal assault.

(78 Ala. 463.)

CHAPMAN v. STATE.

(*Supreme Court of Alabama*. Dec. Term, 1884.)

ASSAULT—WHAT CONSTITUTES.

Presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages.

Appeal from circuit court, Barbour county.

Indictment for assault and battery. Defendant was convicted of assault, and appealed from the judgment.

H. D. Clayton, Jr., for appellant. *Thos. N. McClellan*, Atty. Gen., for the State.

SOMERVILLE, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault. It may be that, if the indictment had been for robbery, the facts in evidence would have sustained the allegation of an assault, which, in cases of that nature, is often merely constructive; for every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive. The present conviction, however, can be sustained only on the theory that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous had the weapon been loaded and discharged. On this question, the adjudged cases, both in this country and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators of the law. We have had occasion to examine these authorities with some care on more occasions than the present, and we are of the opinion that the better view is that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm," and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson v. Hafner*, 26 Amer. Rep. 81; *Cooley*, Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence. *State v. Davis*, 1

Ired. 125. The approved definition of an "assault" involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. § 82; *Rosc. Crim. Ev.* (7th Ed.) 296; *People v. Lilley*, 43 Mich. 521, 5 N. W. Rep. 982. Most of our decisions recognize the old view of the text-books, that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another. 1 Russ. Crimes, (9th Ed.) 1019; *State v. Blackwell*, 9 Ala. 79; *Tarver v. State*, 43 Ala. 354. In *Lawson v. State*, 30 Ala. 14, it was said that, "to constitute an assault, there must be the commencement of an act which, if not prevented, would produce a battery." The case of *Balkum v. State*, 40 Ala. 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions. It is true that some of the modern text-writers define an assault as an apparent attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Crim. Ev. § 603; 2 Bish. Crim. Law, § 32. The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can, at common law, constitute an assault. It is unquestionably true that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray, and presenting a walking cane, as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and therefore entirely free from alarm. *People v. Lilley*, 43 Mich. 525, 5 N. W. Rep. 982. And one may be put in fear under pretense of beg-

ging, as in *Taplin's Case*, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C. 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Greenl. Crim. Law Rep., and note on pages 271-275, where all the cases are fully reviewed; 2 Add Torts, (Wood's Ed. 1881,) § 788, note, pages 4-7; Rose. Crim. Ev. (7th Ed.) 296; 1 Russ. Crimes, (9th Ed.) 1020; *Blake v. Barnard*, 9 Car. & P. 626; *Reg. v. James*, 1 Car. & K. 530; *Robinson v. State*, 31 Tex. 170; *McKay*

v. State, 44 Tex. 43; *State v. Davis*, 35 Amer. Dec. 735. The opposite view is sustained by the following authors and adjudged cases: 7 Bish. Crim. Law, (7th Ed.) § 32; 1 Whart. Crim. Law, (9th Ed.) §§ 182, 603; *Reg. v. St. George*, 9 Car. & P. 483; *Com. v. White*, 110 Mass. 407; *State v. Shepard*, 10 Iowa, 126; *State v. Smith*, 2 Humph. 457. See, also, 3 Greenl. Ev. (14th Ed.) § 59, note *b*; 1 Archb. Crim. Pr. & Pl. (Pom. Ed.) 282, 283, 907; *State v. Benedict*, 11 Vt. 238; *State v. Neely*, 74 N. C. 425. The rulings of the court were opposed to these views, and the judgment must therefore be reversed, and the cause remanded.

(*Beach v. Hancock*, 27 N. H. 223, holds that a civil action will lie for aiming an unloaded pistol within shooting distance, with an apparent purpose of firing. *Com. v. White*, 110 Mass. 407, holds such an act to be also a criminal assault; while *State v. Sears*, 86 Mo. 169; *State v. Godfrey*, 17 Or. 300, 20 Pac. Rep. 625,—are to the contrary. See, also, *People v. Lilley*, 43 Mich. 521, 5 N. W. Rep. 982; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. Rep. 820.)

(3 Carr. & P. 373.)

MORTIN v. SHOPPEE.

(*Court of King's Bench*. Oct. 27, 1828.)

ASSAULT—WHAT CONSTITUTES.

Riding after a person, so as to compel him to run to shelter to avoid being beaten, is, in law, an assault.

Action for assault. Plea, the general issue. The plaintiff was walking along a footpath, by the road-side, at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden, when the defendant rode up to the garden gate, (the plaintiff then being in the garden about three yards from him,) and, shaking his whip, said: "Come out, and I will lick you before your own servants."

Mr. Denman, C. S., for defendant, objected that this did not amount to an assault.

TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff. Damages, 40s.

(4 Carr. & P. 349.)

STEPHENS v. MYERS.

(*Court of Common Pleas*. July 17, 1830.)

ASSAULT—WHAT CONSTITUTES.

Advancing in a threatening attitude and with intent to strike another, so that the blow would almost immediately reach him, is, in law, an assault by the person advancing with such intent, although he is stopped before he is near enough to the other to strike him.

Action for assault. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty. It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat; there being about six or seven persons between him and the plaintiff. The defendant hav-

ing, in the course of some angry discussion which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced, with his fist clenched, towards the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

Mr. Spankie, Serjt., for the defendant, upon this evidence, contended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat; there was not a present ability; he had not the means of executing his intention at the time he was stopped.

TINDAL, C. J., in his summing up, said it is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages, 1s.

(See, also, *Hays v. People*, 1 Hill, 351, for a good definition of an assault.)

Effect of accompanying words indicating that there is no intent to do actual violence.

(1 Ired. Law, 375.)

STATE V. CROW.

(*Supreme Court of North Carolina. June Term, 1841.*)

ASSAULT—WORDS INDICATING INTENT.

At the trial of an indictment for assault, there was evidence that defendant, in a quarrel with another, raised a whip and shook it at him, saying at the same time, "Were you not an old man, I would knock you down;" but he did not strike, although within striking distance, and not prevented by any one. *Held*, that the jury might consider such words, if used by defendant, as tending to qualify his acts; and that if at the time he raised his whip he had no present purpose to strike, it was not, in law, an assault.

Appeal from superior court, Rutherford county; BATTLE, Judge.

Indictment against Abraham Crow for assault on William Grayson. At the trial, a witness testified that he heard some words between the parties, and then saw defendant raise his whip, and shake it at Grayson, and heard him swear that he had a great mind to kill Grayson, and that defendant was at the time within striking distance of Grayson, but did not strike him, although no one interfered. One or two others testified that they did not see defendant raise the whip, but heard him say to Grayson, "Were you not an old man, I would knock you down." On behalf of defendant, his counsel argued that these words, accompanying his acts, qualified them, and showed that he had no intention of striking, and that consequently there was no such offer or attempt to strike as would constitute an assault. The court charged the jury that, even though such words were used by defendant when he raised his whip and shook it at Grayson, yet if his conduct was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike his assailant in self-defense, the latter would be guilty. Otherwise there might be a fight, and the peace broken, and yet neither party be guilty. And, further, that otherwise one man might follow another all over the court-yard, shaking a stick over his head, and yet not be guilty, provided he took care to declare, while he was doing so, that "he had a great mind to knock him down." The jury found defendant guilty.

(The rule is the same in civil and criminal cases. *Tuberville v. Savage*, 1 Mod. 3; *Com. v. Eyre*, 1 Serg. & R. 347. Compare *State v. Hampton*, 63 N. C. 13.)

A motion by him for a new trial was denied and judgment was pronounced against him. From the judgment he appealed.

The Attorney General, for the State, cited Archb. Crim. Pl. 347; *Hawkins*, c. 52, § 1.

No counsel appeared for defendant.

DANIEL, J. The judge charged the jury "that if the conduct of the defendant was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike in self-defense, the defendant would by such conduct be guilty of an assault." We admit that such conduct would be strong evidence to prove, what every person who relies on the plea of *son assault demesne* must prove to support his plea, to-wit, that his adversary first attempted or offered to strike him; but it is not conclusive evidence of that fact, for if it can be collected, notwithstanding appearances to the contrary, that there was not a present purpose to do an injury, there is no assault. *State v. Davis*, 1 Ired. 127. The law makes allowance to some extent for the angry passions and infirmities of man. It seems to us that the words used by the defendant, contemporaneously with the act of raising his whip, were to be taken into consideration, as tending to qualify that act, and show that he had no intention to strike. The defendant did not strike, although he had an opportunity to do so, and was not prevented by any other person. The judges should, as it seems to us, have told the jury that if, at the time he raised his whip and made use of the words, "Were you not an old man, I would knock you down," the defendant had not a present purpose to strike, in law it was not an assault. We again repeat what was said in *Davis' Case*: "It is difficult to draw the precise line which separates violence menaced from violence begun to be executed, for, until the execution of it be begun, there can be no assault." The evils which the judge supposed might follow, if the law was different from what he stated it to be, can always be obviated by the offending party's being bound to his good behavior. There must be a new trial.

New trial awarded.

Nature of a battery.

(6 Mod. 149.)

COLE V. TURNER.

(*Court of King's Bench. Easter Term, 1794.*)

ASSAULT AND BATTERY—WHAT CONSTITUTES A BATTERY.

To touch another in anger, though in the slightest degree, or to use violence against another to rudely force a passage, is, in law, a battery.

Before HOLT, C. J., at *nisi prius*.

HOLT, C. J., upon evidence in trespass for assault and battery, declared—*First*, that the least touching of another in anger is a battery; *secondly*, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery; *thirdly*, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a bat-

tery, or any struggle about the passage to that degree as may do hurt will be a battery.

(SS Ala. 100, 7 South. Rep. 154.)

ENGELHARDT V. STATE.

(Supreme Court of Alabama. Jan. 15, 1890.)

ASSAULT AND BATTERY — WHAT CONSTITUTES A BATTERY.

Defendant approached another, holding a stick raised, within striking distance, as if to strike the latter, and, when prevented by the act of the latter in wrenching the stick from him, drew a pistol. The other seized and turned aside the hand holding the pistol as it was discharged, and they struggled together, until defendant fell or was forced to the ground, the pistol being again discharged in the air during the struggle. *Held*, that such laying hold of each other's persons in a rude and hostile manner constituted a battery, and that, there being no justification therefor on the part of defendant, he was guilty of an assault and battery.

Appeal from city court of Montgomery; THOMAS ARRINGTON, Judge.

Indictment against John Engelhardt for an assault on W. F. Vandiver with intent to murder him. The assault was committed on the sidewalk in front of the defendant's store, in the city of Montgomery, where Vandiver was standing with one J. Faunce. Vandiver testified that the defendant passed him a few moments before the assault, and came back, and said to him, "You have not treated me right;" that he attempted to pass into his store, but was intercepted by the defendant, who "jumped back and drew his pistol;" that after deliberation, "thinking that there was no fight in him," witness commenced advancing on him, having in his hand an open pen-knife, with which he had been cleaning his finger nails; that the defendant fired at him, pointing his pistol towards him, but witness clinched him, and got control of the pistol; that the pistol was again discharged during the struggle between them, but he succeeded in getting the defendant down, and held him down, with the aid of Faunce. Faunce testified, on the part of the prosecution, that the defendant, when he approached Vandiver, had a small cane in his hand, which he raised when in striking distance, but Vandiver wrenched it from his hand; that the defendant then drew his pistol, which was self-cocking, and Vandiver caught his right hand, and turned the pistol aside as it was discharged, the ball striking the ground; and that the weapon was again discharged during the struggle between them, or as the defendant was falling. The court charged the jury that, "if they believe the evidence, the defendant was guilty of an assault, or an assault and battery." The defendant excepted to this charge. The jury found defendant guilty of assault and battery, and he was fined \$300. Defendant appealed from the judgment of conviction.

A. A. Wiley, for appellant. Tennent Lomax, for the State.

SOMERVILLE, J. 1. The court, in our opinion, committed no error in charging the jury that, if they believed the evidence, the defendant was guilty of assault, or assault and battery. There was undoubtedly an attempt or offer, on the defendant's part, with force and violence, to do a corporal hurt to the prosecutor,—an attempt manifested both by aiming and firing a loaded pistol in the direction of his person, and by raising a stick, within striking distance, as if to strike him, which was prevented by his wrenching the stick from the defendant's hand. This was clearly an assault, constituting, as it did, one or more acts, either of which, if consummated, would have resulted in a battery. *Chapman v. State*, 78 Ala. 463, ante, 70.

2. The evidence, moreover, shows a battery, which is "the unlawful application of violence to the person of another." *May*, *Crim. Law*, § 55; *Com. v. McKie*, 61 *Amer. Dec.* 410. "A battery is not necessarily a forcible striking with the hand or stick, or the like, but includes every touching or laying hold (however trifling) of another's person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner." 1 *Amer. & Eng. Enc. Law*, 783. There is no conflict in that part of the evidence showing the circumstances attending the difficulty. To prevent being shot by the pistol, the prosecutor, Vandiver, seized the defendant's right hand, which contained the weapon, forcing its discharge in the air. The use of the stick was interrupted in like manner by its seizure. The combatants "clinched" and "struggled together," the defendant either falling in the struggle, or being pushed backward to the ground, and firing his pistol a second time in the air. The prosecutor and a by-stander thereupon got on the defendant, and held him down. He may or may not have used more force than was necessary to resist the assault by the defendant. This is entirely immaterial, for had both of the combatants fought willingly together, and neither in self-defense, each would have been guilty of an assault and battery on the other. *Com. v. Collberg*, 119 *Mass.* 350; *Adams v. Waggoner*, 33 *Ind.* 531. The language describing the contest necessarily implies a contention or striving together for the mastery, one of the other,—a laying hold of each other's person in a rude and hostile manner. This was a battery. It may have been justifiable on the part of the person assailed, and no doubt was. But there is no sort of pretext that the act was justifiable on the part of the defendant. There was no error in the charge on this subject to which exception was taken.

* * * * *

The judgment must be affirmed.

Assault and battery—Effect of consent.

(45 Ohio St. 177, 12 N. E. Rep. 185.)

BARHOLT v. WRIGHT.

(Supreme Court of Ohio. May 10, 1887.)

ASSAULT AND BATTERY—CONSENT.

It is no defense to an action for assault and battery that the acts complained of were committed in a fight engaged in by mutual consent, although such consent may be shown in mitigation of damages.

Error to circuit court, Portage county.

Action for assault and battery. The evidence showed that plaintiff and defendant went out to fight by agreement, and did fight, and plaintiff was severely injured; one of his fingers being so bitten, among other things, that it had to be amputated. The court charged that, if the parties fought by agreement, plaintiff could not recover, and a verdict was returned for defendant. Upon error to the circuit court a new trial was ordered. Defendant now brings error to reverse that order.

P. B. Couant and J. N. Nichols, for plaintiff in error. *W. B. Thomas, Geo. F. Robinson, and Cole & Wright*, for defendant in error.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus, in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom, Leg. Max. 268. But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten than it does an agreement to part with his liberty, and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. 2 Greenl. Ev. § 85; Logan v. Austin, 1 Stew. (Ala.) 476. This, however, is the full extent to which

the cases have gone. We will notice a few of them. In *Boulter v. Clark*, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the chief baron saying: "The fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action." Bull. N. P. 16. A number of earlier cases were cited, and among them that of *Matthew v. Ollerton*, Comb. 218, where it is said "that, if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Steph. N. P. 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in *Bell v. Hansley*, 3 Jones, (N. C.) 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for, such agreement to break the peace being void, the maxim, *volenti non fit injuria*, does not apply." The following cases are to the same effect: *Stout v. Wren*, 1 Hawks, 420; *Adams v. Waggoner*, 33 Ind. 531; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. Rep. 473; *Logan v. Austin*, 1 Stew. (Ala.) 476. And so it was held in *Com. v. Collberg*, 119 Mass. 350, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill will. *Champer v. State*, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter. No case has been cited that can be said to be to the contrary. What is said by PECK, J., in *Smith v. State*, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Inter-course, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion. In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge Cooley in his work on Torts (page 163)

that "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. * * * A man may not even complain of the adultery of his wife which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. * * * The rule of law is therefore clear and unquestionable that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." See, also, to like effect, *Pollock on Torts*, 139. Neither is the case of *Champer v. State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the states, as well as by some text-writers. By the statutes of this state a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray is not affected by the statute, nor by the decision just referred to. Such seems to have been the view taken by *BOYNTON, J.*, in the subsequent case of *Darling v. Williams*, 35 Ohio St. 63. The case of *Fitzgerald v. Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm, if the act was intentionally done. It is upon the same principle of public policy that one who is the first assailant in a fight may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the

assailant for the excess of force used beyond what was necessary for self-defense. *Dole v. Erskine*, 35 N. H. 503; criticizing *Elliott v. Brown*, 2 Wend. 499; *Cooley*, *Torts*, 165; *Darling v. Williams*, 35 Ohio St. 63; *Gizler v. Witzel*, 82 Ill. 322. And see, also, *Com. v. Collberg*, supra. It would seem that under the Code the right of each combatant to damages might be determined and measured in the same action. *Swan*, Pl. Prec. 259, note a. And upon like principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery. *Rutter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442; *Whitehead v. Mathaway*, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong. A question was made as to the admissibility of the evidence of an agreement to fight under the issue made by the pleadings, the answer being a general denial. If the evidence had been competent for any purpose, other than in mitigation of damages, it would have been under the issue as made. It was insisted on in denial of the right of action, and not as an avoidance of it; so that it was not necessary to be pleaded as new matter. If it had been so pleaded, it would have been subject to a demurrer. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted in fact to a mayhem. "Where the injury," (a mayhem,) says the author of a recent and quite valuable work on *Criminal Procedure*, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose." *Maxw. Crim. Proc.* 260. It was permissible to the defendant to show the agreement to fight in mitigation of damages, but not as a bar to the action.

Judgment affirmed.

(See, also, *Fitzgerald v. Cavin*, 110 Mass. 153; *Com. v. Collberg*, 119 Mass. 350; *Pillow v. Bushnell*, 5 Barb. 156; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. Rep. 473.)

Justifiable and excusable assaults and batteries.

— A. Self-defense—Defense of property.

(4 Denio, 448.)

SCRIBNER v. BEACH.

(*Supreme Court of New York*. May, 1847.)

JUSTIFIABLE OR EXCUSABLE ASSAULT — SELF-DEFENSE—DEFENSE OF PROPERTY.

Plaintiff having made charcoal on land which defendant had previously occupied, defendant came to the place, during plaintiff's absence therefrom, and began raking out the coal from the pit with a rake. Plaintiff, returning, took hold of the rake to take it from defendant, and defendant knocked him down. Plaintiff again attempted to take the rake, and defendant struck him with

it and broke his arm. *Held*, that there was a manifest disproportion between the assault by plaintiff and the battery by defendant, and the latter was not justified, either on the ground of self-defense, or of defense of possession of the coal, even if defendant had title thereto.

Motion for new trial.

Action of trespass for assaulting plaintiff. Defendant pleaded not guilty, with notice of *son assault demesne*, and that the assault was committed in defense of defendant's personal property, namely, a pit of charcoal and a coal rake. At the

trial it appeared that the assault occurred on land of which defendant had been in possession about three years previously; that, defendant having removed to another county, plaintiff had taken possession of the land, and had burned charcoal upon it. While plaintiff was absent, for the purpose of taking the coal to market, defendant came to the pit, and began taking out the coal with a rake which he found there, having also a wagon in which to remove the coal. Plaintiff, returning, asked defendant what he was doing, to which defendant answered that if plaintiff would come there he would show him. Plaintiff then took hold of the rake, for the purpose of taking it from defendant, who, with one hand, knocked plaintiff down. Plaintiff arose, and again took hold of the rake; but defendant pulled it away, and with it aimed a blow at plaintiff's head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist, and fractured it. Defendant offered proof that he had title to the land on which the coal was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land; but on objection by plaintiff's counsel to this evidence, it was excluded. The jury found a verdict for plaintiff for \$150. Defendant moved for a new trial on a case.

J. Van Vleck, for the motion. *H. Hogeboom*, opposed.

JEWETT, J. Self-defense is a primary law of nature, and it is held an excuse for breaches of the peace, and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defense, prevention, or recovery, so as to become vindictive; for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497; *Gates v. Lounsbury*, 20 Johns. 427; *Gregory v. Hill*, 8 Term R. 299; *Baldwin v. Hayden*, 6 Conn. 453; 3 Bl. Comm. 3-5; 1 Hawk. P. C. 130; *Cockcroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 N. H. 539. A man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. bk. 1, c. 60, § 23; *Seaman v. Cuppledick*, Owen, 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or to desist, and, if he refuses, he should gently lay his hands on him for the purpose of removing him, and, if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 Term R. 78; *Bull. N. P.* 19; 1 East, P. C. 406. It is otherwise if the trespasser enter the close with force. In that case the owner may, without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose only of subduing his violence. "A civil trespass," says *Holroyd, J.*, "will not justify the firing a pistol at the trespasser in sudden resentment or

anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling-house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house. He ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." *Meade's Case*, *Lewin*, 185; *Rosc. Crim. Ev.* 262. The rule is that, in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person, (as to rob, or murder, or to commit a rape upon a woman,) or upon a man's habitation or property, (as arson or burglary,) the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. *Fost. Cr. Law*, 273. The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus a person having a right to the possession of lands may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a party who has no right, and is himself a tort-feasor. Although if the entry in such case be with a strong hand, or a multitude of people, it is an offense for which the party entering must answer criminally. *Hyatt v. Wood*, 4 Johns. 150; *Sampson v. Henry*, 13 Pick. 36. In respect to personal property, the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace; for, should these accompany the act, the party would then be answerable criminally. But the riot or force would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it to one who was not the owner. *Hyatt v. Wood*, *supra*. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrong-doer, even without a previous request; but unless it was seized, or attempted to be seized, forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrong-doer to recover it. *Weaver v. Bush*, *supra*; *Com. Dig.* "Pleader," 3 M, 17; *Spencer v. McGowen*, 13 Wend. 256. In one branch of the defense the defendant set up *son assault demesne*. That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defense of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defense of which he committed the assault. To sustain this defense, he proposed to prove that the coal-pit was on new and unim-

proved land, to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of the strife between the parties was the possession of the rake, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still the defendant could not justify the wounding merely in defense of his possession. *Gregory v. Hill*, supra. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

(131 Mass. 423.)

COMMONWEALTH v. O'MALLEY.

(*Supreme Judicial Court of Massachusetts*.
Oct. 11, 1881.)

JUSTIFIABLE OR EXCUSABLE ASSAULT—SELF-DEFENSE—KILLING ASSAILANT.

A person attacked is justified in defending himself by shooting his assailant, if he has reason to believe that the assailant intends to do him great bodily harm, and that he is in danger of such harm, and that no other means can effectually prevent it.

Exceptions from superior court.

Indictment against William O'Malley for the manslaughter of Malachi Grady. At the trial it appeared that, previous to the killing of Grady, he and defendant had had a dispute, and Grady had made threats against defendant; that, on the morning of the day on which the killing occurred, there were further angry words between them about the same matter at defendant's house; that Grady left the house, and, a few hours afterwards, they met on the street; that Grady then violently at-

tacked defendant, and gave him several serious blows on and about the head and face; and that, in the course of this encounter, defendant shot Grady with a pistol, inflicting a wound from the effects of which Grady died. Defendant requested the judge to instruct the jury that, if defendant had reason to believe that Grady intended to do him great bodily harm, and had reason to believe he was in danger of great bodily harm, he would be justified in defending himself by shooting his assailant. The judge gave the instruction requested, but inserted after the words, "danger of great bodily harm," and before the words, "he would be justified," the words, "which no other means could effectually prevent." The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. Marston, Atty. Gen., for the Commonwealth. G. F. Verry and J. W. Corcoran, for defendant.

GRAY, C. J. According to the manifest intent and natural meaning of the instruction given to the jury, the qualification, "if the defendant had reason to believe," applied to the clause, "which no other means could effectually prevent," as well as to the rest of the proposition laid down by the court. In legal effect, as in common understanding, the instruction was that if the defendant had reason to believe that his assailant intended to do him great bodily harm, and that he was in danger of such harm, which, as he had reason to believe, no other means could effectually prevent, he would be justified in defending himself by shooting him. Anything less than this would clearly afford no justification. Trial of Selfridge, 160; Com. v. Woodward, 102 Mass. 155, 161. The suggestion in argument that the instruction excluded all other means of self-defense which might result in the death of the assailant than shooting is a strained interpretation, which there is nothing in the bill of exceptions to show could have been applied to the evidence before the jury.

Exceptions overruled.

(See, also, as to self-defense, *Shorter v. People*, 2 N. Y. 193; *Panton v. People*, 114 Ill. 505, 2 N. E. Rep. 411; *Marts v. State*, 26 Ohio St. 162. As to defense of brother, *State v. Greer*, 23 W. Va. 800. As to defense of one's land, *Com. v. Clark*, 2 Metc. (Mass.) 23; *Kiff v. Youmans*, 86 N. Y. 324; *Souter v. Codman*, 14 R. I. 119. As to defense of one's home, *State v. Middleham*, 62 Iowa, 150, 17 N. W. Rep. 443; *State v. Peacock*, 40 Ohio St. 333. As to defense of chattels, *People v. Dann*, 53 Mich. 490, 19 N. W. Rep. 159.)

(148 Mass. 529, 20 N. E. Rep. 171.)

COMMONWEALTH v. DONAHUE.

(*Supreme Judicial Court of Massachusetts*.
Feb. 28, 1889.)

JUSTIFIABLE OR EXCUSABLE ASSAULT — DEFENSE OF PROPERTY.

One whose property is taken wrongfully by another may retake it from him, using reasonable force. What is such force is a question of fact for the jury.

Exceptions from superior court, Franklin county.

Indictment against Thomas Donahue for robbery. Defendant was convicted of assault, and alleged exceptions.

John McIlvene, for defendant. A. J.

Waterman, Atty. Gen., for the Commonwealth.

HOLMES, J. This is an indictment for robbery, in which the defendant has been found guilty of an assault. The evidence for the commonwealth was that the defendant had bought clothes amounting to \$21.55 of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money, and put it in his pocket, and told the defendant he owed

him \$1.55, whereupon the defendant demanded his money back, and, on Mitchelman refusing, attacked him, threw him on the floor, and choked him, until Mitchelman gave him a pocket-book containing \$29. The defendant's counsel denied the receiving of the pocket-book, and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth, it appeared, or, at the lowest, the jury might have found, that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered, (*Com. v. Stebbins*, 8 Gray, 492,) he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud, (*Com. v. Devlin*, 141 Mass. 423, 421, 6 N. E. Reg. 64; *Chiffer's Case*, T. Raym. 275, 276; *Reg. v. Thompson, Leigh & C.* 225; *Reg. v. Slowly*, 12 Cox, Crim. Cas. 269; *Reg. v. Rodway*, 9 Car. & P. 784; *Rex v. Williams*, 6 Car. & P. 390; 2 East, P. C. c. 16, §§ 110-113.) See *Reg. v. Cohen*, 2 Denison, Cr. Cas. 249, and cases *infra*. The defendant made a demand, if that was necessary,—which we do not imply,—before using force. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. (N. S.) 197; *Com. v. Clark*, 2 Metc. (Mass.) 23, 25; and cases *infra*. It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt. 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton, Moody & M.* 107; Y. B. 9 Edw. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, 1 Brown. & G. 215; *Shingleton v. Smith*, Lutw. 1481, 1483; 2 Inst. 316; *Finch, Law*, 203; 2 Hawk. P.

C. c. 60, § 23; 3 Bl. Comm. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; *Rogers v. Spence*, 13 Mees. & W. 571, 581; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Comm. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.) 713, 12 C. B. (N. S.) 501, 13 C. B. (N. S.) 844, 11 H. L. Cas. 621; *Com. v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgden v. Hubbard*, 18 Vt. 504. See *Johnson v. Perry*, 56 Vt. 703. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. 81. See *Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whitridge*, 2 Strob. 232; 3 Bl. Comm. 4. It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person. If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Com. v. Clark*, 2 Metc. (Mass.) 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the

difficulties which we have stated could have been got over, we might have had to consider cases like *Reg. v. Boden*, 1 Car. & K. 395, 397; *Reg. v. Hemmings*, 4 Post. & F. 50; *State v. Hollyway*, 41 Iowa, 200. Compare *Com. v. Stebbins*, 8 Gray, 492;

Com. v. McDuffy, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. *State v. Nash*, 88 N. C. 618. The facts were as the defendant believed them to be. Exceptions sustained.

— B. Rightful expulsion by carrier of passengers.

(43 Ill. 420.)

ILLINOIS CENT. R. CO. *et al.* v. WHITE-MORE.

(*Supreme Court of Illinois*. April Term, 1867.)

1. JUSTIFIABLE OR EXCUSABLE ASSAULT—CARRIERS—EXPULSION OF PASSENGER.

A rule of a railroad company requiring passengers to surrender their tickets on the trains is a reasonable regulation, and, for a wanton refusal to comply therewith, the company may expel the passenger from the train, using no more force than is necessary for the purpose, and not selecting a dangerous or inconvenient place.

2. SAME.

The statute of Illinois forbidding railroad companies to expel passengers from their trains for non-payment of fare, at any place other than a regular station, does not apply to such a case; a refusal to surrender a ticket, for which the requisite fare has been paid, is not the same offense as a refusal to pay fare.

3. SAME—REASONABLE REGULATION—QUESTION OF LAW.

The question whether a regulation of a railroad company requiring passengers to surrender their tickets is reasonable is for the court, either with or without testimony on the subject; to submit it to the jury is error.

Appeal from circuit court, Marshall county; SAMUEL L. RICHMOND, Judge.

Williams & Burr, for appellants. *Ingersoll, Puterbaugh & Shaw*, for appellee.

LAWRENCE, J. This was an action of trespass, brought by Whittemore against the Illinois Central Railroad Company and N. W. Cole, a conductor in the service of the company, for wrongfully expelling the plaintiff from a train. It appears the plaintiff had taken passage from Decatur to El Paso, and had procured the necessary ticket. After the train passed Kappa, the station preceding El Paso, the conductor demanded plaintiff's ticket, which the latter refused to surrender without a check. This the conductor refused to give, and, after some controversy with the plaintiff, stopped the train, and, with the aid of a brakeman, expelled the plaintiff. There is considerable evidence in the record given for the purpose of showing that, even admitting the right of the defendants to expel the plaintiff, an unnecessary and wanton degree of violence was used, from which the plaintiff received a permanent and severe injury. As, however, the case must be submitted to another jury, we forbear from any comments on this portion of it. The jury gave the plaintiff a verdict for \$3,125, for which the court rendered judgment, and the defendants appealed. In sustaining a demurrer to the fourth plea, and in giving the instructions, the circuit court held that, although the rules of the road required the conductor

to take up the plaintiff's ticket, and notwithstanding he may have refused to surrender it when demanded, the defendants had no right to expel him from the cars, except at a regular station. In support of this position, it is urged by counsel for appellee that the refusal to surrender the ticket was merely equivalent to a refusal to pay the fare, and that the statutory prohibition against the expulsion of passengers for this cause, except at a regular station, should be applied to cases like the present. We held in the case of *Railroad v. Flagg*, (decided at the January term, 1867, 43 Ill. 364,) that the neglect to buy a ticket before entering the train, when required by the rules of the road, was the same thing, in substance, as the refusal to pay the fare, and justified an expulsion only at a regular station. But the refusal to surrender a ticket, for which the requisite fare has already been paid, is certainly not the same thing as refusal to pay the fare. It may be no worse offense against the rights of the railroad company than the refusal to pay the fare, but it is not the same offense. Perhaps there was no good reason why the legislature should have forbidden railways to expel a passenger only at a regular station for the non-payment of fare, and have left them at liberty to expel one at any other point, for the disregard of any other reasonable rule. But it has done so, and it is our duty to leave the law as the legislature thought proper to establish it. What, then, is the right of a railway company in reference to its passengers? Clearly, to require of them the observance of all such reasonable rules as tend to promote the comfort and convenience of the passengers, to preserve good order and propriety of behavior, to secure the safety of the train, and to enable the company to conduct its business as a common carrier, with advantage to the public and to itself. So long as such reasonable rules are observed by a passenger, the company is bound to carry him, but, if they are wantonly disregarded, that obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common-law right, arising from the nature of their contract and occupation as common carriers, and, as already remarked, it has been restricted by the legislature only in cases where the offense consists in non-payment of fare. *Railroad Co. v. Parks*, 18 Ill. 460; *Hilliard v. Goold*, 34 N. H. 230; *Cheney v. Railroad Co.*, 11 Metc. (Mass.) 121. If, then, the regulation requiring passengers to surrender their tickets was a reasonable one, the ruling of the

court below on this point was erroneous.

That the rule is a reasonable one really admits of no controversy. It was shown by witnesses on the trial, and must be apparent to any one, that the company must have the right to require the surrender of tickets, in order to guard itself against imposition and fraud, and to preserve the requisite method and accuracy in the management of its passenger department. The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done; but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passenger. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that

it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public. A similar view has recently been taken of this question in the case of *Vedder v. Fellows*, 20 N. Y. 126. The judgment must be reversed; but if it appears, upon another trial, that unnecessary violence was used, the defendants must respond in damages.

Judgment reversed.

(See, also, *Pease v. Railroad Co.*, 101 N. Y. 367, 5 N. E. Rep. 37; *Murdock v. Railroad Co.*, 137 Mass. 293; *State v. Gould*, 53 Me. 279; *Steam-Boat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; *Sanford v. Railroad Co.*, 23 N. Y. 343; *Sullivan v. Railroad Co.*, 148 Mass. 119, 18 N. E. Rep. 678; *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. Rep. 590; *Railroad Co. v. Skillman*, 39 Ohio St. 441.)

— C. Discipline of children, pupils, etc.

(53 Conn. 481, 2 Atl. Rep. 841.)

SHEEHAN v. STURGES.

(*Supreme Court of Errors of Connecticut*. Nov. 24, 1885.)

1. JUSTIFIABLE OR EXCUSABLE ASSAULT—SCHOOLS—PUNISHMENT OF PUPIL.

A teacher may inflict corporal punishment on a pupil, if necessary to enforce compliance by the pupil with proper rules for the good conduct and order of the school; but he must exercise sound discretion and judgment, and the punishment should be adapted, not only to the offense, but to the offender.

2. SAME—ACTION FOR ASSAULT AND BATTERY—QUESTION OF FACT.

In an action against a teacher for an assault and battery in whipping a pupil, the extent and reasonableness of the punishment is purely a question of fact.

3. SAME—EVIDENCE.

In such an action, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.

Appeal from superior court, Fairfield county; BEARDSLEY, Judge.

Action for assault and battery. Judgment was rendered for defendant. Plaintiff appealed from the judgment.

John S. Seymour, for appellant. *John H. Perry* and *Winthrop H. Perry*, for appellee.

GRANGER, J. This is a complaint for an assault and battery. The defense is that the plaintiff was at the time a pupil in a school kept by the defendant; that he willfully violated the reasonable rules of the school, and disobeyed the reasonable commands of the defendant as his teacher; and that for this misconduct the defendant, as such teacher, whipped him in a reasonable manner. The sole controversy upon the trial was as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive, and was

fully justified by the plaintiff's misconduct at that time." The extent and reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court, therefore, settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross-examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether, on two former occasions, both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defendant afterwards in his testimony in his own behalf was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks and the other seven or eight days before the whipping in question, the plaintiff had assaulted him while he was chastising him. The defendant was also allowed, on the plaintiff's cross-examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket, and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so; and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done. The defendant did not inform the plaintiff, at the time of the whipping, that he was punishing him for his past and habitual misconduct. We think that the court committed no error in admitting the inquiries and evidence. The right of the school-master to require obedience to reasonable rules and a proper submission to

his authority, and to inflict corporal punishment for disobedience, is well settled. It is said in the Encyclopedia of Education, edited by Kiddle & Schem, page 189, that "the school codes of the United States are generally silent in regard to the right of teachers to inflict corporal punishment, and there are numerous judicial decisions in favor of this right. By English and American law a parent may correct his child in a reasonable manner, and the teacher is *in loco parentis*;" citing 2 Kent, Comm. 203; 1 Bl. Comm. 453; Com. v. Randall, 4 Gray, 36; State v. Pendergrass, 2 Dev. & B. 365; Stevens v. Fassett, 27 Me. 280; Lander v. Seaver, 32 Vt. 123.

As incident to this relationship, it is the right of the teacher, in the absence of rules established by the school board or other proper authority, to make all necessary and proper rules for the good conduct and order of the school; and it is his duty to see that order is maintained and the rules observed; and if any scholar violates the rules, and disobeys the orders of the teacher, it is the duty of the latter to enforce compliance, and to that end it may be necessary to inflict personal chastisement, as without it he might lose all control of the school. In inflicting such punishment the teacher must exercise sound discretion and judgment, and must adapt it, not only to the offense, but to the offender. Horace Mann, a high authority in the matter of schools, says of corporal punishment: "It should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and, when employed at

all, should be administered in strong doses." Of course the teacher, in inflicting such punishment, must not exceed the bounds of moderation. No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Reeve, Dom. Rel. 288. Each case must depend upon its own circumstances. In Com. v. Randall, 4 Gray, 36, it is held that "in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil; and, as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration. We think, therefore, that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider, not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offenses. The pupil knew them well enough, without having them brought freshly to his notice. There is no error.

The other judges concurred.

(See, also, Patterson v. Nutter, 78 Me. 509, 7 Atl. Rep. 273; Danenhoffer v. State, 69 Ind. 295. As to punishment by parents, see State v. Jones, 95 N. C. 555; by masters of vessels upon seamen, Brown v. Howard, 14 Johns. 119.)

— D. Act of public officer in performance of official duty.

(20 Barb. 16.)

HAGER *et al.* v. DANFORTH.

(*Supreme Court of New York.* Albany, General Term. Sept. 4, 1854.)

JUSTIFIABLE OR EXCUSABLE ASSAULT—SERVICE OF PROCESS.

Defendant went to the house of plaintiffs, who were husband and wife, to serve on the husband, who was in the house, a subpoena in a suit then pending, and, finding a door open, entered peaceably; but the wife ordered him out, and resisted him in attempting to proceed to the stairs, in search for the husband, although he told her he had a subpoena to serve. *Held*, that defendant was in the house under a legal license, and it was not his duty to leave when ordered to do so by the wife; and that he had a right to use such force as was necessary to overcome her unlawful resistance to the service of the subpoena, and was liable only for any excess of violence used by him.

Appeal from special term.

Action by Daniel J. Hager and wife for an assault and battery alleged to have been committed upon the wife by defendant. It appeared that a previous action had been brought before a justice of the peace by Danforth, the defendant in this action, against the plaintiff Daniel J. Ha-

ger; that on the day on which that action was to be tried, Danforth, having procured from the justice a subpoena for Hager as a witness therein, went to Hager's house for the purpose of serving it; that he found a door open, and entered, but was met and resisted by Mrs. Hager, who ordered him out of the house; that Danforth replied to her that he had a subpoena to serve on Hager, and, Hager being upstairs at the time, Danforth attempted to force his way to the stairs, against the resistance of Mrs. Hager, and in doing so choked her and threw her back against the catch of a door, slightly bruising her; and that thereafter Hager came downstairs, and Danforth then served the subpoena upon him, and soon after left the house. The judge charged the jury that a license to enter the house for the purpose of serving the subpoena was implied, but that "after Mrs. Hager had ordered the defendant out the subpoena was not a justification or protection to him in pressing forward, and, when resisted in his advance, using force to serve it." To this part of the charge defendant excepted. The jury found a verdict for plaintiffs for \$250. Defendant moved upon a case

for a new trial, which motion was denied, and from the order denying a new trial defendant appealed to the general term.

Before WRIGHT, HARRIS, and WATSON, Justices.

H. Hogeboom, for appellant. *L. Tremain*, for respondents.

HARRIS, J. The defendant went to the plaintiffs' house with process which he was authorized by law to serve. 2 Rev. St. p. 240, § 82. The person upon whom he was to make the service was in the house. These facts amounted to a legal license, and having found the door open, and entered peaceably, the defendant was lawfully there. Deriving his authority to be there from the law, and not from the consent of the plaintiffs, he was under no obligation to obey Mrs. Hager when she ordered him to leave. Not having conferred upon him his license, she had no power to revoke it. He was as rightfully there after he had been directed to leave as before. I know of no duty which bound him to desist from the execution of the lawful purpose which had brought him there. If his taste led him to encounter the vituperation and violence of such a woman as he met there, it was his right to do so. To the extent, therefore, that the force used by the defendant was necessary to overcome the unlawful resistance he met in the service of the sub-

pœna, it was lawful. Mrs. Hager was the wrong-doer, and not the defendant. If he used more force than was necessary to enable him to accomplish his purpose, to that extent he is liable as a wrong-doer. The jury were led to understand, upon the trial, that, after Mrs. Hager had ordered the defendant out, the subpoena furnished him no justification or protection. In effect, they were instructed that, by remaining after having been ordered to leave, the defendant became a trespasser. In this they were misled, and the result was a verdict against the defendant to an amount entirely unwarranted by the evidence. The jury ought to have been told that, inasmuch as the defendant had entered the house in a peaceable manner, under a license given him by law, he had a right to remain there until he had effected the service of the subpoena; that Mrs. Hager, by resisting the defendant in making such service, was herself guilty of an unlawful act; and that the defendant was justified, notwithstanding such resistance, in using all the force necessary to enable him to serve the subpoena; and that he was only liable for any excess of violence used by him more than was necessary to overcome the resistance with which he met. I am of opinion, therefore, that the order of the special term should be reversed, and that a new trial should be granted, with costs to abide the event.

(Compare *Hull v. Bartlett*, 49 Conn. 64.)

FALSE IMPRISONMENT.

What constitutes false imprisonment.

(7 Adol. & E. [N. S.] *742.)

BIRD v. JONES.

(Court of Queen's Bench. July 9, 1845.)

FALSE IMPRISONMENT — WHAT CONSTITUTES IMPRISONMENT.

Plaintiff, attempting to pass in a particular direction along part of a public highway which had been inclosed by defendant, was obstructed by the latter, who prevented him from proceeding in that direction, but left him at liberty to go in another direction. *Held*, that there was no imprisonment on which plaintiff could maintain an action for false imprisonment. DENMAN, C. J., dissenting.

Rule *nisi* for new trial.

Action of trespass for assault and false imprisonment. At the trial, before DENMAN, C. J., the jury found a verdict for plaintiff. Defendant obtained a rule *nisi* for a new trial, on the ground of misdirection, consisting of a statement by the chief justice to the jury at the trial that an imprisonment of plaintiff had taken place before plaintiff assaulted defendant.

Platt, Humfrey & Hance, showed cause. *Sir F. Thesiger*, Sol. Gen., in support of the rule.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my Brother PATTESON, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists. This point is whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are, in effect, as follows:

A part of a public highway was inclosed, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but, after a struggle, during which a momentary detention of his person took place, he succeeded in climbing over the

inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts, and, setting aside those which do not properly bear on the question now at issue, there will remain these: That the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful, with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person, and go in any other direction, at his free will and pleasure, and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much. I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary, large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing. He must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases. But imprisonment is something more than the mere loss of this power. It includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. "Imprisonment," (G,) it is said: "Every restraint of the liberty of a freeman will be an imprisonment." For this the authorities cited are 2 Inst. 482; Herbert and Stroud's Case, Cro. Car. 210. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called,—a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d, (1 St. 13 Edw. II. c. 48,) "*in priso*na," and says: "Every restraint of the liberty of a freeman is an imprisonment, although he

be not within the walls of any common prison." The passage in Cro. Car. is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate-House Prison, to which they had been committed by the king. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate-House. The occasion is somewhat singularly expressed in the decision of the court, which was "that their voluntary retirement to the close stool" in the Gate-House "made them to be prisoners." The resolution, however, in question is this: "That the prison of the king's bench is not any local prison, confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary, and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge; and I am unwilling to put any extreme case hypothetically; but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined in it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.

WILLIAMS, J. I also have had the benefit of seeing, and beg leave to refer to, what my Brother PATTESON has written, explaining the manner in which the only question now before us in this case is raised, and showing that it depends upon whether the following facts constitute an imprisonment in point of law:

A part of Hammersmith bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that pur-

pose from the carriage-way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the bridge company) pulled him back, but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forward along the footway in the direction he wished to go. The plaintiff, however, was at the same time told that he might go back into the carriage-way, and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour. And, if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but, at the same time, another course was open to him.

About the meaning of the word "imprisonment," and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case. "Every confinement of the person," according to Blackstone, (3 Bl. Comm. 127,) "is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets," which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second Institute, (2 Inst. 589.) speaks of "a prison in law" and "a prison in deed;" so that there may be a constructive, as well as an actual, imprisonment; and therefore it may be admitted that personal violence need not be used in order to amount to it. "If the bailiff," as the case is put in Bull. N. P. 62, "who has a process against one, says to him, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actually hold of him. No return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller's *Nisi Prius* it is remarked that if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest, unless

the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable, as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and, after some delay, to be compelled to return and take another and circuitous route to his place of destination. I do not think that, during such detention, such person was under imprisonment, or could maintain an action for false imprisonment, whatever other remedy might be open to him. I am desirous only to illustrate my meaning, and explain the reason why I consider the imprisonment in this case not to be complete. The reason, shortly, is that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him, if he chooses to avail himself of it.

PATTESON, J. This was an action of trespass for an assault and false imprisonment. The pleas were,—as to the assault, *son assault demesne*; as to the imprisonment, that the plaintiff, before the imprisonment, assaulted the defendant, wherefore the defendant gave him into custody. The replication was *de injuria* to each plea. This puts in issue, as to the first plea, who committed the first assault; and, as to the second, whether the imprisonment was before or after the assault, if any, committed by the plaintiff. Supposing the defendant to have made the first assault, and the plaintiff to have followed, and such continuous assaulting to have taken place, the plaintiff must succeed on the issue as to the first plea. Supposing a continuous imprisonment to be established, and an assault by the plaintiff, but which took place in trying to escape from that imprisonment, and not before the imprisonment, the plaintiff must succeed on the issue as to the second plea. If, on the other hand, the plaintiff did assault the defendant before the imprisonment, then he must fail upon the issue as to the second plea, even if his assault was justifiable, because in that case he should have replied such justification, as, for instance, defense of his close, or that he was in the exercise of a right of way which the defendant obstructed, or other matter of justification. Now, the facts of this case appear to be as follows: A part of Hammersmith bridge, which is ordinarily used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage-way by a temporary fence. The plaintiff insisted on passing along the part so appropriated, and attempted to climb over the fence. The defendant, being clerk of the bridge company, seized his coat, and tried to pull him back. The plaintiff, however, succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forward along the footway; but he was told he might go back into the carriage-way, and proceed

to the other side of the bridge, if he pleased. The plaintiff would not do so, but remained where he was above half an hour, and then, on the defendant still refusing to suffer him to go forward along the footway, he endeavored to force his way, and, in so doing, assaulted the defendant; whereupon he was taken into custody.

It is plain from these facts that the first assault was committed by the defendant when he tried to pull the plaintiff back as he was climbing over the fence; and, as the jury have found the whole transaction to have been continuous, the plaintiff would be entitled to retain the verdict which he has obtained on the issue as to the first plea. Again, if what passed before the plaintiff assaulted the defendant was in law an imprisonment of the plaintiff, that imprisonment was undoubtedly continuous, and the assault by the plaintiff would not have been before the imprisonment, as alleged in the second plea, but during it, and in attempting to escape from it; and the plaintiff would, in that case, be entitled to retain the verdict which he has obtained on the issue as to the second plea. But, if what so passed was not in law an imprisonment, then the plaintiff ought to have replied the right of footway and the obstruction by the defendant, and that he necessarily assaulted him in the exercise of the right, and, not having so replied, is not entitled to the verdict. So that the case is reduced to the question whether what passed before the assault by the plaintiff was or was not an imprisonment of the plaintiff in point of law.

I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice TINDAL, involving this question; but it appears that the plaintiff in that case was compelled to stay and hear a letter read to him against his will, which was doubtless a total restraint of his liberty while the letter was read. I agree to the definition in Selwyn's *Nisi Prius*, title "Imprisonment:" "False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, etc., or even by forcibly detaining the party in the streets against his will." He cites 22 Book Ass. fol. 104, B, pl. 85, per THORPE, C. J. The word there used is "arrest," which appears to me to include a "detaining," as Mr. Selwyn expresses it, and not to mean merely the preventing a person from passing. Upon the whole, I am of opinion that the only imprisonment proved in this case was that which occurred when the plaintiff was taken into custody after he had assaulted the defendant, and that the second plea was made out; I therefore think that the rule for a new trial ought to be made absolute.

DENMAN, C. J. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter, both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of one line into another. There is some difficulty, perhaps, in defining "imprisonment" in the abstract, without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Bul-
ler's *Nisi Prius* (page 22) it is said: "Every restraint of a man's liberty under the custody of another, either in a jail, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery, for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person. A locking up would constitute an imprisonment without touching. From the language of THORPE, C. J., which Mr. Selwyn cites from the Book of Assizes, (22 Book

Ass. fol. 104, B, pl. 85,) it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment. I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape. It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs would suffer by delay?

It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice TINDAL, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him, yet he did not prevent his escaping in another direction. It said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ, stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous; it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

Rule absolute.

(See, also, *Hildebrand v. McCrum*, 101 Ind. 61; *Marshall v. Heller*, 55 Wis. 392, 13 N. W. Rep. 236; *Sorenson v. Dundas*, 50 Wis. 335, 7 N. W. Rep. 259; *McNay v. Stratton*, 9 Ill. App. 215; *Mowry v. Chase*, 100 Mass. 79.)

(90 N. Y. 77.)

LYNCH V. METROPOLITAN EL. RY. CO.

(Court of Appeals of New York. Oct. 10, 1882.)

FALSE IMPRISONMENT—DETENTION OF PASSENGER BY CARRIER.

Plaintiff purchased a ticket for a passage upon defendant's railway, and entered one of its cars, but, before reaching his destination, he lost his ticket. On attempting to pass from the station platform through the gate into the street, he was prohibited by the gate-keeper, and told that he could not pass until he should produce a ticket or pay his fare. He explained that he had paid his fare and lost his ticket, and insisted on passing out, but was pushed back by the gate-keeper; and, on his further insisting on his right to pass, the gate-keeper sent for a police officer, and ordered his arrest, whereupon he was arrested by the officer. *Held*, that the detention of plaintiff by the gate-keeper for the purpose of enforcing payment of fare was illegal; and that defendant, having instructed its gate-keepers not to let passengers pass out until they should either pay their fares or show tickets, was liable to plaintiff for the false imprisonment by the gate-keeper. FRICH, J., dissenting.

Appeal from supreme court, general term, first department.

Action by Michael Lynch against the Metropolitan Elevated Railway Company for false imprisonment. At the trial the jury found a verdict for plaintiff, and judgment for plaintiff was entered thereon, which was affirmed on appeal to the general term. From the judgment of the general term defendant appealed.

R. E. Deyo, for appellant. *Charles C. Smith*, for respondent.

EARL, J. In September, 1878, the plaintiff purchased a ticket for a passage upon defendant's railway from its Forty-Second

Street station to its Rector-Street station, and entered one of its cars. Before reaching his destination he lost his ticket, and when he attempted to pass from the station platform through the gate into the street he was prohibited by the gate-keeper, and told that he could not pass until he produced a ticket or paid his fare. He explained that he had paid his fare and lost his ticket, and insisted upon passing out. He was pushed back by the gate-keeper, who refused to let him pass. He expostulated, and insisted upon his right to pass, when the gate-keeper sent for a police officer, and ordered his arrest. He was arrested, and taken to a police station by the police officer, the gate-keeper going along, and making complaint against him. He was locked up in the station-house over night. In the morning the gate-keeper appeared against him, and he was examined before a police magistrate, and discharged. This action was afterwards commenced to recover damages for the false arrest and imprisonment. He recovered a judgment, which has, upon appeal, been affirmed. 24 Hun, 506.

We are of opinion that the trial judge was right in holding, as matter of law, that the plaintiff's arrest and detention were illegal. The defendant had the right to make reasonable rules and regulations for the management of its business and the conduct of its passengers. It could require every passenger before entering one of its cars to produce a ticket, and to produce and deliver up the ticket at the end of his passage, or again pay his fare. *Railroad Co. v. Page*, 22 Barb. 130; *Hibbard v. Railroad Co.*, 15 N. Y. 455;

Vedder v. Fellows, 20 N. Y. 126; *Townsend v. Railroad Co.*, 56 N. Y. 295. The defendant had such a regulation, and no complaint can be made of that. But it had no regulation, and could legally have none, that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and, if he did not, that he should then and there be detained and imprisoned until he did so. At most, the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time, until compliance with its demands. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will, until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gate-keeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare. This is not like the cases to which the learned counsel for defendant has called our attention, where railroad conductors have been held justified in ejecting passengers from cars for refusing to produce tickets or pay their fares. A passenger has no right to ride in a car without payment of his fare, and, if he refuses to pay, the railroad company is not bound to carry him, and may, at a proper place and in a proper manner, remove him from the car; but it could not imprison him in a car until he paid his fare, for the purpose of compelling payment.

These views have the sanction of very high authority. In *Sunbolt v. Alford*, 3 Mees. & W. 248, it was held that an innkeeper could not detain the person of his guest in order to secure payment of his bill. Lord ABINGER said: "If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law a man who owes a small debt, for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. * * * Where is the law that says a man shall detain another for his debt without process of law?" In *Chilton v. Railway Co.*, 16 Mees. & W. 212, the defendant was organized under an act conferring much broader powers than are possessed by the defendant in this case, and yet it was held that it could not arrest a passenger for refusing to pay a fare which it was entitled to demand. In *Standish v. Steam-Ship Co.*, 111 Mass. 512, the plaintiff purchased a ticket before going upon the defendant's steam-boat for a passage from Fall River to New York. The defendant's regulation was that the passenger should, upon leaving the boat

at the end of his passage, deliver up his ticket or pay his fare. When the plaintiff reached New York he found he had lost his ticket, and when he attempted to leave the boat he was prohibited, and told that he could not pass until he produced a ticket or paid his fare. He was detained two hours, and then, under protest, paid his fare, and was permitted to leave the boat. He sued the company for false imprisonment, and recovered \$50. The trial judge charged the jury that "the law gave the defendant a lien on the baggage of the plaintiff, but not on his person; that they had no right to detain him until he did pay his fare or give up a ticket, or to compel him to pay his fare or give up a ticket, but that, if he knew that he was to give up his ticket before leaving the boat, the defendant had a right, if he did not give it up or pay his fare, to detain him for a reasonable time to investigate on the spot the circumstances of the case; and if the jury found that the defendant detained him for the purpose of compelling him to pay his fare or to give up his ticket, or detained him for the purpose of investigating his case an unreasonable time, or in an unreasonable way, he was entitled to recover." The plaintiff appealed, alleging for error that the judge erred in charging the jury that the defendant had a right to detain him a reasonable time to investigate the circumstances of the case. No portion of the charge was condemned, and the portion excepted to by the plaintiff was held to be correct.

A municipal corporation authorized to make by-laws and pass ordinances, and inflict penalties for their violation, cannot enforce obedience to them by imprisonment, unless expressly authorized so to do by statute. *Potter, Corp.* § 81; *Clark's Case*, 5 Coke, 64. It was argued before us, on behalf of the defendant, that the ticket sold to the plaintiff was the property of the defendant, intrusted to him for a special purpose, and that it had the right to prevent him, at the end of the journey, from carrying away this property. I am not quite ready to assent that after the defendant sold the ticket to the plaintiff it retained any right of property therein. But, even if it did, it did not detain him on that ground, and he did not then have the ticket in his possession or under his control, and hence a detention to compel him to deliver it up could not, on that ground, be justified.

There was no error in the charge of the judge in reference to the branch of the case we have thus far considered. The counsel of the defendant excepted to that portion of the charge of the judge wherein he said, in substance, that the defendant had no more right to detain plaintiff until he paid his fare than a lawyer would have to detain in his office a client who consulted him, and refused to pay his fee. There was no error in this illustration. The detention in either case is unlawful, and is condemned in the law upon precisely the same principles.

There was no error in refusing to charge the request made by defendant's counsel that "the regulation of the defendant requiring passengers to produce and surren-

der a ticket or pay the legal fare before leaving the station was a reasonable regulation." It is true that whether a regulation is a reasonable one or not is a question of law for the court, but this request reached too far. It implied that the passenger was to remain in the station, and submit to indefinite detention there, until he paid his fare, and such a regulation would not be reasonable.

It now remains only to be considered whether the defendant was responsible for the acts of the gate-keeper. When the plaintiff attempted to pass through the gate the gate-keeper told him that in resisting and detaining him he was simply doing his duty, and he testified that in all he did he considered that he was acting in the line of his duty. The defendant's president testified that there was a rigid rule of the company that passengers were required to show at the gate that they had paid their fare in order to be able to pass out; that when they came to the gate the rule was that the gate-keeper was not to let them go out till they either paid their fare or showed a ticket; and that the instructions to the gate-keepers were to collect tickets or fare. From these facts, and all the circumstances of the case, if it is not entirely plain, the jury could at least find that the company expected the gate-keeper would detain a passenger who could not or would not produce a ticket or pay his fare at the

gate, and the gate-keeper clearly understood that it was his duty so to do. In anything that he did, he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal. It matters not that he exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service. He detained the plaintiff at the station, caused his arrest, went with the police officer to the police station, there made a complaint, and then, the next morning, appeared before the police magistrate, and renewed his complaint. These were successive steps taken by the gate-keeper to enforce the payment of the fare by the plaintiff, or to punish him for refusing to pay it, and for all that he did the defendant is responsible. The principles upon which the liability of a master rests in such a case have been so fully and plainly laid down in recent cases in this court that a restatement of them now would serve no useful purposes. *Rounds v. Railroad Co.*, 64 N. Y. 129; *Mott v. Ice Co.*, 73 N. Y. 543; *Devine v. Mills*, 90 N. Y. 637, *mem.* The judgment should be affirmed, with costs.

All concur, except FINCH, J., dissenting, and RAPALLO, J., not voting.

— Arrest upon void process.

(64 Wis. 316, 25 N. W. Rep. 442.)

GELZENLEUCHTER V. NIEMEYER.

(*Supreme Court of Wisconsin*. Nov. 3, 1885.)

FALSE IMPRISONMENT — ARREST UNDER WARRANT VOID ON ITS FACE.

In an action for false imprisonment, it is not a defense that defendant's participation in the arrest and detention complained of was under a warrant issued by a magistrate, when such warrant is void on its face.

Appeal from circuit court, Columbia county.

Action by John Gelzenleuchter against Henry W. Niemeyer. The complaint alleged, in effect, that on November 13, 1883, the defendant, at Columbus, Columbia county, maliciously, and with force and arms, assaulted the plaintiff, and, with intent to injure him, directed, caused, and procured him to be forcibly, and against his will, arrested, imprisoned, and restrained of his liberty for the space of six hours, without any reasonable or probable cause whatever, and without any right or authority so to do, to his damage, etc. The answer justified the arrest and imprisonment as being duly and lawfully made by the deputy-sheriff of that county, under and by virtue of a criminal warrant duly and lawfully issued by a justice of the peace of that county, the body of which warrant is as follows: "Whereas, Hy. W. Niemeyer has this day made complaint, on oath, in writing, to the undersigned, a justice of the peace for

said county, that John Gelzenleuchter did, on the ninth day of November, A. D. 1883, at the city of Columbus, in said county, unlawfully and maliciously use in reference to this complainant, and in the presence of John A. Kitzerow, abusive language, by calling the complainant 'a swindler,' which language naturally tended to provoke a breach of the peace, against the peace and dignity of the state of Wisconsin, and prays that the said John Gelzenleuchter may be arrested and dealt with according to law: Now, therefore, you are hereby commanded forthwith to apprehend the said John Gelzenleuchter, and bring him before me, to be dealt with according to law. Given under my hand at Columbus this ninth day of November, 1883." That the plaintiff, on being brought before the justice, pleaded to the charge, procured an adjournment, and was released on his own recognizance, and on the adjourned day tried and found not guilty. On the trial of this action the plaintiff put in evidence to the effect that the complaint upon which the criminal warrant was issued, and therein mentioned, was made, signed, and sworn to by the defendant in this action, November 9, 1883; that said complaint was then filed with and by the justice, who thereupon issued the criminal warrant mentioned, reciting substantially all that is contained in the complaint, and delivered it to the defendant; that the defendant's attorney delivered the

criminal warrant to the deputy-sheriff, who arrested the plaintiff thereon, as stated, and kept him under arrest thereon for about three hours; that, on the day the defendant made the complaint for the criminal warrant before the justice, he violently, and without any cause or provocation, assaulted, struck, kicked, and greatly injured the plaintiff. At the close of the plaintiff's testimony the court granted a nonsuit and dismissed the action, and from the judgment entered thereon the plaintiff appealed.

J. J. Sutton, for appellant. *G. W. Stephens* and *P. G. Stroud*, for respondent.

CASSODAY, J. The attempt was made, as it is claimed, to prosecute the plaintiff for the violation of section 4398, Rev. St. It is not claimed that the plea of not guilty and adjournment before the justice was any waiver of the question of jurisdiction. It clearly was not within the rule stated in *Steuer v. State*, 59 Wis. 472, 18 N. W. Rep. 433. The learned counsel for the defendant frankly concedes that the complaint made by the defendant before the justice charges no offense whatever, and that the warrant issued thereon, reciting the complaint, charges no offense whatever; and hence that the warrant is absolutely void upon its face,—especially within the rule announced by this court in *Steuer v. State*, supra. With equal frankness the same counsel also concedes that the evidence in the record tends to show that the defendant maliciously made the complaint, and that he received the warrant from the justice, delivered it to his attorney, who delivered it to the officer for the purpose of having the plaintiff arrested thereon; and that the plaintiff was arrested and imprisoned thereon for the space of three hours. The counsel for the defendant also concedes that, had the defendant caused the plaintiff to be arrested upon a void process in a civil action, then he would have been liable therefor in an action for false imprisonment, as this clearly is, even though he acted in good faith. But counsel ingeniously contends that “an action for false imprisonment cannot be maintained against a party who makes, or attempts to make, a criminal complaint to a magistrate, upon which the magistrate causes an arrest by issuing his warrant, whether the facts stated constitute an offense or not.” In support of this contention he cites several authorities, English and American.

A careful reading of these cases discloses the fact that they are all distinguishable. In *Beaty v. Perkins*, 6 Wend. 382, both the warrant and the complaint upon which it was issued seems to have charged an offense, and of course it was held that the party making the complaint was not liable in trespass. In *Stewart v. Hawley*, 21 Wend. 552, the constable who made the arrest was the party who made the complaint to the justice, and it was held that an action of trespass, or false imprisonment, could not be maintained against him or the justice, and this was put on the ground that the recitals in the complaint and warrant presented “a case within the jurisdiction of the justice, and

which called for the exercise of his judicial functions, and if so, though he may have erred, he is not liable.” Page 556. Chief Justice NELSON said: “I cannot agree with the plaintiff that the facts are so barren as not to lay the foundation for jurisdiction, or that the decision was so gross as to afford evidence *per se* of the influence of bad motives.” In *Von Latham v. Libby*, 38 Barb. 345, the opinion of the court expressly states that “the only connection of the defendants with the arrest or detention of the plaintiff * * * is that they stated their case to the magistrate, charging the plaintiff with a misdemeanor upon the facts which they swore to, and asked for his arrest;” and for that reason it was held that they were not liable for false imprisonment. Several of the other cases relied upon by counsel are to the same effect, as in *Murphy v. Walters*, 34 Mich. 180; *Grinham v. Willey*, 4 Hurl. & N. 496; *Barber v. Rollinson*, 1 Cramp. & M. 330; *Carratt v. Morley*, 1 Q. B. 18; *West v. Smallwood*, 3 Mees. & W. 418. The true distinction is sharply made in the last two cases cited. In *West v. Smallwood* the warrant of arrest was without jurisdiction, and it was held that a party merely making a complaint before a magistrate on a subject over which he has general jurisdiction is not liable to false imprisonment; but it was held that the fact that the complainant accompanied the constable charged with the execution of the warrant “was evidence to go to the jury of a participation in the arrest.” In *Carratt v. Morley* the former was arrested on a warrant issued on a judgment by default in a civil action in favor of the latter, but Morley in no way participated in making the arrest. Carratt then brought an action of trespass for false imprisonment against Morley, the six commissioners who ordered the warrant to be issued by their clerk, and the officer making the arrest. The commissioners were without jurisdiction. Lord ABINGER thought that Morley was “not liable, inasmuch as he had only stated his case to the commissioners, who proceeded to adjudge upon it,” but was in doubt as to the commissioners and the officer, and “leave was therefore reserved to move for a nonsuit generally, and on the other hand for a verdict against all the defendants except” Morley. The court of queen’s bench, per Lord DENMAN, C. J., held that they were all liable except Morley.

Such are the authorities upon which we are asked to sustain the nonsuit. It will be observed that none of the cases cited go to the extent of holding that a warrant void upon its face is a defense in an action of false imprisonment for one who participated in making the arrest. On the contrary, two of the cases squarely hold that such void warrant is no protection to such a person in such an action. Had the defendant done nothing more than to have sworn to the complaint before the justice, he would not, under these authorities, have been liable in this action. But here there is some evidence tending to prove that after the warrant was issued the defendant did participate in making the arrest. The distinction between false imprison-

ment and malicious prosecution was indicated in *Murphy v. Martin*, 58 Wis. 279, 16 N. W. Rep. 603. In that case it was held that the fact that the warrant upon which the arrest was made was void on its face was not available to the plaintiff in an action for malicious prosecution, but only in an action for false imprisonment. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. *Id.*; *Elsee v. Smith*, 2 Chit. 304; *Nebenzahl v. Townsend*, 10 Daly, 236; *Brown v. Chadsey*, 39 Barb. 260-263. In such an action the imprisonment cannot be false, for it is upon lawful process, and hence by lawful authority. False imprisonment, on the other hand, is a trespass committed against a person by unlawfully arresting and imprisoning him without any legal authority. *Id.*; 2 *Add. Torts*, 798; *Bourden v. Alloway*, 11 Mod. 180; *Burns v. Erben*, 40 N. Y. 463; *Lock v. Ashton*, 12 Q. B. 871. Thus the arrest of the right person by the wrong name, through a misnomer in the process, without an allegation that the true name is unknown, is false imprisonment. *Hoye v. Bush*, 1 Man. & G. 775; *Scheer v. Keown*, 29 Wis. 586. Where, in an action for false imprisonment, the arrest and detention are admitted, and the only justification relied upon by a defendant having participated therein is that such arrest and detention were

under a warrant issued by a magistrate, it must appear, in order to be available, that such warrant was valid upon its face. *West v. Smallwood*, *supra*; *Carratt v. Morley*, *supra*; *Grumon v. Raymond*, 1 Conn. 40; *Poult v. Slocum*, 3 Blackf. 421; *Vaughn v. Congdon*, 56 Vt. 111; *Hoye v. Bush*, 1 Man. & G. 775; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Flack v. Harrington*, 12 Amer. Dec. 170; *Gold v. Bissell*, 1 Wend. 210, 19 Amer. Dec. 480; *Floyd v. State*, 54 Amer. Dec. 250; *Mitchell v. State*, *Id.* 253, and notes to cases; *Smith v. Shaw*, 12 Johns. 257; *Miller v. Adams*, 52 N. Y. 409; *Abbott v. Booth*, 51 Barb. 546; *Harwood v. Siphers*, 70 Me. 464; *Gorton v. Frizzell*, 20 Ill. 291; *Sheldon v. Hill*, 33 Mich. 171; *Green v. Elgie*, 5 Q. B. 99. There must not only be a jurisdiction of the subject-matter, but also a jurisdiction of the process. *Grumon v. Raymond*, *supra*; *Vaughn v. Congdon*, *supra*. A warrant absolutely void upon its face, as the one before us is conceded to be, is necessarily a nullity,—mere waste paper,—and hence, in an action of false imprisonment, can afford no protection to one participating in making an arrest under it.

The evidence tending to show that the defendant participated in making the arrest after the warrant was issued is weak, but we think it was sufficient to take the case to the jury. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

(See, also, *Emery v. Hapgood*, 7 Gray, 55; *Gold v. Bissell*, 1 Wend. 210; *Blythe v. Tompkins*, 2 Abb. Pr. 468.)

— Arrest upon irregular process—Difference between “irregularity” and “error.”

(103 N. Y. 84, 8 N. E. Rep. 251.)

FISCHER v. LANGBEIN *et al.*

(*Court of Appeals of New York*. Oct. 5, 1886.)

1. FALSE IMPRISONMENT—ARREST UNDER VOID OR IRREGULAR PROCESS.

The liability of an attorney who causes the issue of void or irregular process, for loss or injury thereby occasioned to the party against whom it is enforced, attaches, in the case of void process, when the wrong is committed, no preliminary proceeding to vacate or set it aside being necessary to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it of some preliminary requisite, or of the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court before an action can be maintained for damages occasioned by its enforcement.

2. SAME.

When a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, an order or process based on its decision, although afterwards vacated or set aside as erroneous, is not void, nor does it subject the party procuring it to an action for damages thereby inflicted.

3. SAME.

The power of a court to entertain jurisdiction of an action or proceeding does not depend upon

the existence of a substantial cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

4. SAME—COMMITMENT FOR CONTEMPT.

In proceedings by the defendants in an action to punish the plaintiff therein for contempt, all the facts constituting the alleged contempt were undisputed, and were presented to the court having jurisdiction of the proceedings for its consideration. On the hearing it was conceded that the plaintiff had disobeyed an order of the court, and the only question was whether such disobedience defeated, impaired, impeded, or prejudiced any right or remedy of the defendants. The court decided that plaintiff was guilty of contempt, and ordered him to be committed; but its order was reversed on appeal as erroneous in respect of the question of law. *Held*, that such error did not affect the jurisdiction of the court, nor render the commitment void, and plaintiff could not maintain an action for false imprisonment for his arrest and imprisonment under the commitment.

5. SAME—ATTORNEYS OPPOSING MOTION FOR DISCHARGE.

Pending the appeal from the order adjudging the plaintiff guilty of contempt, motions were made for his discharge, on the ground that he had complied with the terms of his commitment, which were opposed by the attorneys for the defendants, and were denied by the court. *Held*, that defendants' attorneys were not thereby rendered liable to an action by the plaintiff for false imprisonment because of his imprisonment after such alleged compliance with the commitment.

Appeal from supreme court, general term, first department.

Action by John Fischer against George F. Langbein and J. C. Julius Langbein for false imprisonment. Defendants were the attorneys for the defendants in a previous action brought by the plaintiff, John Fischer, for the dissolution of an unincorporated association. In that action an order of reference was made, in which was inserted, with the consent of plaintiff, a provision that plaintiff should pay the costs of the reference if the referee should find in favor of defendants as to certain questions. The referee did so find, but plaintiff neglected to take up his report and pay the fees. Thereupon the defendants' attorneys, defendants in this action, procured an order that plaintiff pay such fees within three days, or show cause why he should not be committed for contempt; and, on a hearing upon the return of the order to show cause, the court decided that plaintiff was guilty of contempt, and ordered that a commitment issue, which was done, and plaintiff was committed to jail thereon. The order for the commitment was afterwards reversed, on appeal, and thereafter plaintiff brought this action against defendants for their participation as attorneys in said proceedings. Plaintiff's complaint was dismissed at the trial, and judgment for defendants was entered thereon, which was affirmed by the general term on appeal. From the judgment of the general term plaintiff appealed.

Samuel Hand, for appellant. *George F. Langbein* and *J. C. Julius Langbein*, *in pro.*, and *Jesse K. Furlong*, for respondents.

RUGER, C. J. It cannot be disputed but that an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court before an action can be maintained for damages occasioned by its enforcement. *Day v. Bach*, 87 N. Y. 56. In such cases the process is considered the act of the party, and not that of the court, and he is therefore made liable for the consequences of his act. Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not, in some material respect, comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particu-

lar case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein, is valid and enforceable, and affords protection to all persons acting under it, although it may be afterward set aside or reversed as erroneous. *Simpson v. Hornbeck*, 3 Lans. 53. Errors committed by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders, or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. *Day v. Bach*, *supra*.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected, was void, or even irregular, except for the alleged erroneous determination made by the special term upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff, while, upon appeal, this court held otherwise. All of the facts constituting the alleged contempt were undisputed, and were presented to the special term for its consideration upon the hearing. After hearing the parties it decided that a contempt had been committed, and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff has disobeyed an order of the court, and the only question presented for its consideration was whether such disobedience "defeated, impaired, impeded, or prejudiced" a right or remedy of the defendants. Upon the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded, or prejudiced by the disobedience alleged, and the order adjudging the plaintiff guilty of a contempt was for that reason reversed as erroneous. *Fischer v. Raab*, 81 N. Y. 235. A simple question of law was thus presented to the court as to whether all of the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question. The court concededly had jurisdiction of the parties and the subject-matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a "contempt." An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject-matter of the application. In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff, and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider the ques-

tion whether there had been a contempt committed by her. When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, though he may have held erroneously as matter of law." *Rutherford v. Holmes*, 66 N. Y. 370.

In the present case the court made an order, upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine, and, in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request, and upon his stipulation to pay the fees in the event provided for. The order was therefore lawful, and such as the court had a right to make under the circumstances. The report of the referee being against the plaintiff, he was required to pay the fees, and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt. The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter, and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question. The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

In *Harman v. Brotherson*, 1 Denio, 537, the defendant, a judicial officer, had awarded a *capias* upon affidavits which did not disclose such a cause of action as subjected the defendant to arrest therefor. He was, however, arrested and imprisoned, and in an action against the judge for false imprisonment it was held that he was exempted from liability by reason of the judicial character of his determination.

In *Landt v. Hiltz*, 19 Barb. 283, a county judge was prosecuted for false imprisonment for granting an order of arrest which was afterwards vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It was held, however, that the "decision and the order protect the party applying for it, and the attorney and all persons acting in obedience to the order;" that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question, and to determine whether a case for an order was made out or not." "It presents, to say the least, a colorable case, and that is enough to protect the officer who issued it." It was further said "that the doctrine that the judicial officer is protected whenever he has jurisdiction, and enough is shown to call upon him for a decision, even though he err grossly and even intentionally, has long been firmly established. Upon the same principle of public policy, parties who in good faith institute the proceed-

ings, and act under and in accordance with judicial determination, should be protected from accountability as trespassers whenever the officer is entitled to protection." This case is largely and approvingly quoted from in *Marks v. Townsend*, 97 N. Y. 590, 599.

In *Miller v. Adams*, 7 Lans. 133, affirmed in this court, (52 N. Y. 409,) the defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings, in obedience to an order requiring him to do so. The affidavit upon which the attachment was issued was held, upon appeal, to be defective, and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party procuring it; that the officer issuing the attachment had "jurisdiction of the matter, and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment."

It seems to us that the case of *Williams v. Smith*, 108 E. C. L. 596, is undistinguishable in principle from this. As concisely stated by Justice ERLE, it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very facts between the parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was that he was guilty of a contempt. Upon appeal the lords justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings." It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it, as well as the officers making it.

The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterwards vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void, and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, how-

ever decided, does not render either party or the court making it liable for the consequences of its action.

It is further claimed that the defendants made themselves liable in this action by refusing to consent to the discharge of the plaintiff by the sheriff after he had complied, as it is alleged, with the terms of the commitment, and for opposing, before the special term, proceedings taken for his discharge. These proceedings all took place before it was finally determined that the plaintiff was not guilty of a contempt in refusing to obey the order referred to, and, so far as anything appearing in this record shows, when the defendants naturally believed that the plaintiff was rightfully imprisoned thereunder. The relief claimed was denied by the courts before whom they were taken, and it must here be assumed that it was rightfully denied, for the reason that the plaintiff had not complied with the terms of the order entitling him to a discharge. If the defendants were not liable for damages for the original imprisonment, it is quite certain

that they were not responsible for the action of the sheriff or the court in continuing it. No obligation rested upon the defendants to consent to or procure the discharge of the plaintiff, as the right to such relief depended solely upon his compliance with the terms of the order committing him.

Some claim is made that the commitment was void for not containing the statement that the disobedience referred to as the contempt had defeated, impaired, impeded, or prejudiced some right or remedy of the defendants in the action. Not only the order and affidavit upon which it was founded, but the commitment itself, stated in detail the proceedings which it was claimed the disobedience in question affected, and presented all of the facts upon which the judgment of the court in awarding the commitment was based, and fully complied with the requirements of the rule in respect to the contents of the commitment.

The judgment of the court below should be affirmed, with costs. All concur.

(See, also, *Everett v. Henderson*, 146 Mass. 89, 14 N. E. Rep. 932.)

— Arrest without warrant, where a warrant is by law necessary.

— A. In cases of felony.

(3 Wend. 350.)

HOLLEY v. MIX et al., (in part.)

(*Supreme Court of New York*. Oct., 1829.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT—FELONY.

The arrest of a person who has committed a felony may be justified by any person without a warrant; and an arrest of an innocent person by a private individual is excused if felony was in fact committed, and there is reasonable ground to suspect the person arrested. But, if no felony was committed, an arrest by a private individual without a warrant is illegal, although an officer is justified in making such an arrest if he act upon information upon which he has reason to rely.

Motion for a new trial.

Action by Holley against D. Mix and I. I. Clute for false imprisonment. It appeared that Stephen Mix, a brother of the defendant D. Mix, procured from a justice of the peace a warrant for the arrest of plaintiff on a charge of having feloniously stolen a bank-note of the amount of \$10, belonging to defendant D. Mix; that Stephen Mix procured himself to be deputed to serve the warrant, and pursued and overtook plaintiff, but, having lost the warrant, merely requested plaintiff to return, which plaintiff refused to do; that Stephen Mix then procured the issue of another warrant by another justice of the peace of the same county, on the same charge, against John Doe, plaintiff's name not being known to him, and delivered the warrant to the defendant Clute, who was a constable, and informed Clute that plaintiff had stolen a \$10 bill belonging to defendant D. Mix; that Clute and Stephen Mix again pursued and overtook plaintiff; that Stephen Mix then said he wanted plaintiff as a witness in relation to a \$10

bill dropped in a tailor's shop, but Clute did not hear him say so; that Clute arrested plaintiff, and carried him before the justice who had issued the second warrant; that said justice then, on plaintiff's stating his name, altered the warrant by inserting plaintiff's name, and redelivered it to the constable, and directed him to keep plaintiff in custody until the next morning, when he would be tried by a special sessions, but did not appoint any time or place for the holding of such special sessions, or designate or summon any justices to act with him in holding the same, and said justice heard no more of the matter; that the constable, Stephen Mix, and plaintiff then went to the shop of defendant D. Mix, and thereafter the constable took plaintiff to a tavern, into a back room, from which the constable afterwards came, and handed \$10 to defendant D. Mix, who was in the hall of the tavern; and that the constable and D. Mix had stated that plaintiff had paid the money and the constable's costs to settle the matter. There was no evidence sufficient to establish that any felony had been committed.

The judge charged the jury that the warrant issued by the second justice was not, before the insertion of plaintiff's name therein, any protection to the officer; that an officer has no right to arrest a person upon a criminal charge without warrant, and upon information only, except in cases where there is not time to obtain a warrant, and where an escape would take place unless the arrest was made, but that in this case, there being sufficient time to obtain a warrant, the constable was not justified to arrest upon information; that if the jury believed

that the defendants acted in concert in taking the plaintiff into the back room of the tavern, and that they intended to keep him in custody, and to work upon his fears for the purpose of extorting money from him, they were both liable, and a verdict ought to be rendered against them. The jury found a verdict for plaintiff, and assessed damages against Clute at six cents, and against D. Mix at \$25. Defendants moved on a bill of exceptions to set aside the verdict, and for a new trial.

H. R. Storrs, for plaintiff. *A. C. Paige*, for defendants.

SAVAGE, C. J. There is certainly an inaccuracy in the charge of the judge, as stated in the bill of exceptions. The judge is represented as laying down the broad proposition that a felon can in no case be arrested without warrant, when there is time to obtain one. My understanding of the law is that, if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found, substantially, in 1 Chit. Crim. Law, 15.

The case of *Samuel v. Payne*, Doug. 359, supports the distinction in the above proposition. In that case a search-warrant was taken out by Hall, one of the defendants, upon a charge of theft; but the warrant did not authorize the arrest. The goods were not found, but the plaintiff was arrested, and carried before a magistrate and discharged. On the trial, Lord MANSFIELD laid down the law that, if a felony had been committed, any man, upon reasonable, probable ground of suspicion, may justify apprehending the suspected person, and carrying him before a magistrate; but, if no felony has been committed, such arrest cannot be justified by anybody. The court, however, thought the rule too narrow, and said that, if any person charged another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed, but the person making such charge will be liable; and upon a new trial a verdict was found against Hall, but in favor of the officers. A similar decision was made in *Hobbs v. Branscomb*, 3 Camp. 420, where the plaintiff had been improperly arrested upon a charge of felony where no felony was committed. For the defendants the case of *Samuel v. Payne* was relied on, and a *visi prius* decision of Mr. Justice BULLER, in which he held that, "if a peace-officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but, if he receives a person into

custody on a charge preferred by another of felony or breach of the peace, then he is to be considered a mere conduit, and, if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." Lord ELLENBOROUGH said this rule appeared to be reasonable, and that injurious consequences might follow if peace-officers, under such circumstances, were personally responsible, should it turn out that, in point of law, no felony had been committed. It was not contended upon the trial that a felony had been committed; an action would therefore lie against Stephen Mix, but not against the constable, Clute, provided the arrest was made with a *bona fide* intention of bringing a supposed offender to justice.

* * * * *

(53 N. Y. 14.)

CARL V. AYERS.

(Court of Appeals of New York. May 20, 1873.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT—FELONY.

Although a person is justified in procuring the arrest of another on a criminal charge, where the apparent facts are such as would lead a discreet and prudent person to the belief that a crime had been committed by the person charged, a groundless suspicion, unwarranted by the conduct of the accused or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to an innocent person for causing his arrest.

Appeal from supreme court, general term, second department.

Action by Joseph Carl against George L. Ayers for malicious prosecution in causing the arrest and imprisonment of plaintiff on a charge of stealing or attempting to steal a diamond pin. The evidence given by plaintiff was in substance that, being on a steam-boat, on which were also defendant and his wife and children, and his attention being attracted by the severe coughing of one of the children, and intending to tell defendant of a remedy which he knew, he went to the place where they were sitting, and, being unable to approach defendant in front, stepped behind him, and touched him on the shoulder in order to attract his attention, and said he wished to speak with him; that defendant answered, "If you have anything to say, say it here;" that plaintiff was about to walk away, but turned, and explained to defendant that he merely wished to speak to him in regard to his child's sickness, to which defendant answered, "You never mind about my child; you mind your own business and I will mind mine;" that soon afterwards defendant pointed out plaintiff to a detective officer, and charged plaintiff with larceny or attempt to steal defendant's diamond pin, and insisted on plaintiff's arrest; that plaintiff was arrested thereupon, in the presence of the passengers, about half an hour before the boat landed, and was afterwards taken to a station-house by the officer in company with defendant, and a charge of larceny from the person was preferred against him, on which he was imprisoned all

night, and the following day, being Sunday, until Monday morning; and that the justice before whom he was then brought, after hearing the testimony of defendant and his wife, discharged plaintiff. Plaintiff's complaint was dismissed by the trial judge, and judgment for defendant was entered thereon, which was affirmed by the general term on appeal. From the judgment of the general term plaintiff appealed.

Amasa J. Parker, for appellant.

ANDREWS, J. The court was not justified in nonsuiting the plaintiff if there was any evidence of the want of probable cause for causing his arrest and imprisonment, or unless the case, upon the whole proof, was such that a verdict for the plaintiff upon the issue would have been set aside by the court as against evidence. *Masten v. Deyo*, 2 Wend. 424; *Davis v. Hardy*, 6 Barn. & C. 225. If the evidence on the part of the plaintiff would have justified the jury in finding that the defendant acted without probable cause, then, although the proof on the part of the defendant tended to the opposite conclusion, the nonsuit was erroneously granted. There was no independent or conceded fact shown on the part of the defendant which, admitting the case made by the plaintiff, established the existence of probable cause. In considering the propriety of the nonsuit, the plaintiff is entitled to the concession that the facts existed as they appear in the evidence on his part; and upon these facts, aided by any fact favorable to the plaintiff proved by the defendant, the right of the court to nonsuit is to be determined. "Probable cause," which will justify a criminal accusation, is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont*, 3 Wash. C. C. 37; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. 218. It does not depend upon the guilt or innocence of the accused, or upon fact, whether a crime has been committed. *Baldwin v. Weed*, 17 Wend. 224; *Bacon v. Towne*, supra. A person making a criminal accusation may act upon appearances, and, if the apparent facts are such that a discreet and prudent person would be led to the belief that crime had been committed by the person charged, he will be justified, although it turns out that he was deceived, and that the party accused was innocent. Public policy requires that a person shall be protected who in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a

groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser, when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest. A man has no right to put the criminal law in motion against another, and deprive him of his liberty, upon mere conjecture that he has been guilty of a crime. He cannot be allowed to put a false and unreasonable construction upon the conduct of another, and then justify himself for causing the arrest, by claiming that he acted upon appearances. The application of these familiar principles to the facts in this case leads to a reversal of the judgment. It is not claimed that any larceny was committed, and there was not upon the plaintiff's narration of the circumstances any ground for charging the plaintiff with an attempt to commit a larceny. The case, as made by the plaintiff, is this: While upon the boat his attention was attracted to the defendant's child by her severe coughing, and he went to the place where the defendant was sitting with his wife and child, to inform him of a remedy, and, not being able to pass in front of the defendant, he went behind him, and touched him once or twice on the shoulder to attract his attention, saying he wished to speak with him. He was roughly answered, and turned to leave, but turned back, and stated to the defendant that he intended to speak with him about his child, and the defendant again replied with great incivility, and soon afterwards caused the plaintiff to be arrested on the charge of an attempt to steal his diamond pin. The defendant wore a valuable pin in his shirt bosom, but it does not appear that the plaintiff saw it, nor had he touched the defendant's person, except when he put his hand upon his shoulder. Upon these facts, there was no reasonable ground to suspect that the plaintiff had a criminal motive. His conduct was neither unusual nor improper. There was no act of the plaintiff which could be construed as an attempt to commit a crime. If the defendant entertained a suspicion that the plaintiff designed to take his pin, it was not justified by the circumstances. The evidence on the part of the defendant materially conflicted with that of the plaintiff, but we can consider only the case made by the plaintiff, and we are of opinion that the evidence on his part disclosed a want of probable cause for the arrest, and that the nonsuit was improperly granted. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM, RAPALLO, and FOLGER, JJ., concur. CHURCH, C. J., and GROVER and ALLEN, JJ., do not vote.

(This was really an action for malicious prosecution, but upon the question as to what constitutes reasonable grounds for an arrest without warrant, it also serves as a valuable illustration under the law of false imprisonment.)

(See, also, *Burns v. Erben*, 40 N. Y. 463; *Com. v. Carey*, 12 Cush. 246; *Morley v. Chase*, 143 Mass. 396, 9 N. E. Rep. 767; *McCarthy v. De Armit*, 99 Pa. St. 63; *Cahill v. People*, 106 Ill. 621; *Hogg v. Ward*, 3 Hurl. & N. 417; *Howard v. Clarke*, 20 Q. B. Div. 558.)

— B. In cases of breach of the peace.

(40 Mich. 576.)

QUINN v. HEISEL.

(*Supreme Court of Michigan*. April 23, 1879.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT
—BREACH OF THE PEACE.

An officer has no power to arrest, without a warrant, for a past offense, not a felony, upon information or suspicion thereof. Nor will a threat or other indication of a breach of the peace justify an officer in making an arrest, unless the facts are such as would warrant him in believing an arrest necessary to prevent an immediate execution thereof; and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer.

Error to circuit court, Kent county.

Action of trespass brought before a justice of the peace by John C. Heisel against John Quinn for an assault and battery. Quinn claimed that he was a policeman of the city of Grand Rapids, and gave evidence tending to show that the alleged assault consisted in forcibly arresting Heisel, under an ordinance of that city, for disorderly conduct; there being testimony that Heisel used profane and abusive language to men who were laying railway tracks in front of his house, swearing that he would kill some of them, and approached them with an axe, threatening to cut their heads off, and raised the axe as if about to strike one of them. He resisted arrest, and in the struggle was thrown down and handcuffed. At the trial in the justice's court judgment was rendered for defendant, but, on appeal to the circuit court, plaintiff recovered judgment. Defendant brought error to review the judgment of the circuit court.

Hughes, O'Brien & Smiley, for plaintiff in error. *D. E. Corbitt*, for defendant in error.

MARSTON, J. A careful examination of the record fails to show that plaintiff in error has any cause of complaint. The court certainly charged the jury as to the right of an officer to make arrests without warrant for breaches of the peace, as favorably as common-law rules would warrant, and we are not at present prepared to say that an ordinance of the city of Grand Rapids could authorize arrests without process in cases not justified by common-law principles. The evidence on the part of the plaintiff tended to show that at the time of the arrests there was no disturbance, either actual or threatened, while that on the part of defendant tended to show, not merely a reasonable and probable apprehension of a violation of the ordinance, but an actual disturbance, and the jury was charged that under such circumstances, if a disturbance was found to exist, defendant was justified. The court was requested to charge that, if there had been a breach of the peace before defendant arrived, and plaintiff was about to renew his disorderly conduct, and continue the said breach in presence of the officer, then defendant would be justified in arresting him, even though the disturbance had temporarily

ceased, before defendant came on the ground; also if the jury found, as a matter of fact, that plaintiff had been guilty of a breach of the peace before defendant came where he was, and defendant knew the fact, and had reasonable and probable cause to believe plaintiff was about to renew his offense, then he was justified in arresting; also that if the officer received information from the by-standers that there had been a tumult, and that plaintiff was the cause of it, of which fact plaintiff was afterwards found guilty, and plaintiff, in presence of defendant, made use of language indicating an intention on his part to continue the disturbance, then defendant had a right to arrest without process. These requests were refused, and, under the facts in the case, we think properly.

There are many loose general statements in the books as to the right of officers to make arrests without warrant. That they have a right to arrest for breaches of the peace committed in their presence is conceded by all. It is equally clear that they cannot arrest for a past offense, not a felony, upon information or suspicion thereof, although expressions may be found which would seem to assume such power. How far or when they may interfere by an arrest to prevent a threatened breach of the peace is not equally clear. We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made, coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest, under such circumstances, is to prevent a breach of the peace, where the facts show danger of its being immediately committed.

A reference to some of the authorities may not be inappropriate. In *Reg. v. Mabel*, 9 Car. & P. 474, the jury were charged that, under the circumstances stated by the policemen, they had no authority to lay hold of the defendant, unless they were satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlor. In *Timothy v. Simpson*, 1 Cramp., M. & R. 757, the plea justifying the imprisonment alleged that an affray had been committed, and it appeared that there was danger of its immediate renewal. In *Grant v. Moser*, 5 Man. & G. 123, it was said there should be a direct allegation either of a breach of the peace committing at the time, or that a breach had been committed, and that there was reasonable ground for appre-

hending its renewal. In *Baynes v. Brewster*, 2 Q. B. 384, a plea to a declaration for false imprisonment was held bad which showed that the violent and illegal conduct was over, and it was not stated, nor did it appear, that it would have been repeated if the apprehension had not taken place. In this case *WILLIAMS, J.*, said: "It is not a question, in this place, how far a constable is justified in interfering where an affray is going on in his presence; but no principle is more generally assumed than that a warrant is necessary to entitle him to interfere after the affray is over. It is otherwise where the facts show that the affray is practically going on. That is on account of the obvious distinction, as to public danger, between a riot still raging and one no longer existing." *WIGHTMAN, J.*, in speaking of the right to arrest during the affray, and while there is a disposition shown to resist it, quotes from *Timothy v. Simpson* as follows: "Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts." In *Wheeler v. Whiting*, 9 Car. & P. 262, *PATTESON, J.*, said: "The defendant pleads that the plaintiff was making a disturbance in the house, and ready and desirous to commit a breach of the peace; whereupon he gave him in charge to the policeman, to be dealt with according to law. The policeman, however, was not justified in taking him, unless he saw some breach of the peace committed. On a charge of felony it would be different; and the learned justice doubted whether a plea which stated that the plaintiff was intending to commit a breach of the peace was good. In *Howell v. Jackson*, 6 Car. & P. 723, *PARKE, B.*, distinctly and clearly instructed the jury that to make out the defense they must be satisfied that plaintiff had committed a breach of the peace, and that the watchman saw him do so. In *Knot v. Gay*, 1 Root, 66, it was said an arrest might be made to prevent a breach of the peace which was about to take place. In *State v. Brown*, 5 Har. (Del.) 507, it was said: "A peace-officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace, or other crime, or when he has reasonable ground to suspect the party of such offense." Clearly this last clause does not state the law correctly in not limiting the right to cases of felony. In *McCullough v. Com.*, 67 Pa. St. 32, it was said: "A constable may justify an arrest for a reasonable cause of suspicion alone;" citing in support *Russell v. Shuster*, 8 Watts & S. 309, which was a case of suspicion of felony. In *Com. v. Carey*, 12 Cush. 252, *SHAW C. J.*, said "that a constable or other peace officer could not arrest one without a warrant, for a crime proved or suspected, if such crime were not an offense amounting in law to felony." Other cases might be referred to. There is little danger of being misled by the cases in which it is held an officer may make arrests to pre-

vent a threatened breach of the peace. The interposition in the case of merely threatened violence is not for the purpose of an arrest, in the ordinary sense, but as a peace-officer, to prevent a disturbance or breach of the peace, under a present menace of violence. The judgment must be affirmed, with costs. The other justices concurred.

(11 Johns. 486.)

PHILLIPS v. TRULL.

(*Supreme Court of New York*. Oct., 1814.)

FALSE IMPRISONMENT — ARREST WITHOUT WARRANT—BREACH OF THE PEACE.

In an action for false imprisonment, it is no justification that plaintiff, having been engaged in an affray, was taken into custody until he could be brought before a magistrate, unless defendant was an officer or acted under a warrant.

Demurrer to plea.

Action for assault and battery and false imprisonment. The declaration contained three counts, of which the first and second charged an assault and battery and an imprisonment for six days, and the third charged only an assault and battery. Defendant pleaded (1) not guilty; and, (2) as to the assaulting, etc., and imprisoning the plaintiff, and detaining him in prison for the space of 10 hours, part of the time in the first count of the declaration mentioned, that the plaintiff and three other persons, being in a house occupied by one Fitch, made a great noise, affray, disturbance, and riot in the said house, in breach of the peace; and because the defendant, being a laborer and lodger in the said house, at the request of the said Fitch, in attempting to keep the peace and stop the noise, etc., was assaulted by the plaintiff, he gave charge of the said plaintiff to one Curtis to take him into his custody, and keep him until he could be carried before a justice of the peace, to answer for the said breaches of the peace; and that, at the request and by the order of the defendant, the said Curtis gently laid his hands on the said plaintiff, and took him into custody for the purposes aforesaid; but because it was midnight, and the plaintiff could not be immediately carried before a justice of the peace, he was necessarily detained in the custody of Curtis until the next day, and that he was, as soon as he conveniently could be, carried before a justice; and the defendant avers that, by means of the premises, the plaintiff was necessarily imprisoned for the space of 10 hours, part of the said time, which is the same, etc. To this second plea the plaintiff demurred specially, because (1) it does not answer the first count of the declaration; (2) that it is no justification or bar to the action; (3) that it is double and argumentative, and in other respects uncertain, informal, and insufficient.

Mr. Sill, in support of the demurrer. *Mr. Wendell*, opposed.

PLATT, J. All persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. 3 Hawk. P. C. 157, "Arrest," s. 1. So any person

whatever, if an affray be made, to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace; but, after there is an end of the affray, they cannot be arrested without a warrant. 2 Inst. 52; Burns, J. P. 92. Hawkins (3 Hawk. P. C. 174, b. 2, s. 20)

says: "It seems clear that, regularly, no private person can, of his own authority, arrest another for a bare breach of the peace, after it is over." We are of opinion that the special plea of justification is bad, and the plaintiff is therefore entitled to judgment on the demurrer.

Judgment for plaintiff.

(See, also, Taylor v. Strong, 3 Wend. 384; Wahl v. Walton, 30 Minn. 506, 16 N. W. Rep. 397; Fleetwood v. Com., 80 Ky. 1; Price v. Seeley, 10 Clark & F. 23.)

MALICIOUS PROSECUTION.

Elements of action—"Malice" and "probable cause" defined.

(48 Barb. 30.)

MILLER v. MILLIGAN.

(*Supreme Court of New York.* March 5, 1866.)

1. MALICIOUS PROSECUTION—GROUNDS OF ACTION.

The essential elements of an action for malicious prosecution consist of a previous unfounded prosecution of the plaintiff by the defendant, commenced without probable cause, conducted with malice, and terminating favorably to the party prosecuted.

2. SAME—MALICE—PROBABLE CAUSE.

To sustain the action, want of probable cause for the former suit and malice must concur, and the former cannot be inferred from any degree of malice which may be shown.

3. SAME—BURDEN OF PROOF.

Where plaintiff fails to show that defendant was the real prosecutor in the former suit, or, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, the complaint may properly be dismissed.

INGALLS, J., dissenting.

Exceptions from circuit court.

Action for malicious prosecution, on the ground that a former proceeding against plaintiff, in a district court of the United States, in which he was arrested and indicted for having induced a prisoner, in defendant's custody as a deserter from the army, to escape, and was tried and acquitted of the charge, was instigated by defendant maliciously, and was without probable cause. At the trial the court dismissed the plaintiff's complaint, and ordered his exceptions to be heard in the first instance at the general term.

Argued before MILLER, INGALLS, and HOGEBOOM, JJ.

D. K. Olney, for plaintiff. *T. R. Westbrook*, for defendant.

HOGEBOOM, J. The essential elements of this action are well understood. They consist of a previous unfounded prosecution of the plaintiff by the defendant, commenced without probable cause, conducted with malice, and terminating favorably to the party prosecuted. *Vanderbilt v. Mathis*, 5 Duer, 304; *Foshay v. Ferguson*, 2 Denio, 617; *Besson v. Southard*, 10 N. Y. 236; *McKown v. Hunter*, 30 N. Y. 627. In regard to these, the burden of proof rests

on the plaintiff, and he must establish each of these several propositions or fail in his action. It is often said, in a general way, that malice and the want of probable cause are the ingredients of the cause of action; but it is plain that the other ingredients are implied or understood to exist. *Vanduzor v. Linderman*, 10 Johns. 106; *McCormick v. Sisson*, 7 Cow. 715; *Bulkeley v. Smith*, 2 Duer, 261; *Von Latham v. Rowan*, 17 Abb. Pr. 238, 248; *McKown v. Hunter*, 30 N. Y. 627. Thus, in general, very little is said about the defendant having been the prosecutor, because the question ordinarily is not the subject of dispute, and because, generally, the defendant was the adverse party in the action or proceeding which constituted the *gravamen* of the action for malicious prosecution. But it plainly lies at the very foundation of this action that the plaintiff must show that the defendant, and not somebody else, has prosecuted him,—has been the real party, in fact, who has set on foot and conducted the proceedings against him. This prosecution may have been in the form of a civil action, or of a criminal proceeding; and, when not conducted in the name of the offending party, it would doubtless suffice to prove that he was the real party,—the mover and manager and controller of the prosecution. If he were the mere clerk or agent of others, or a mere witness in the transaction, he would not hold the character nor be liable to the penalties of a malicious prosecutor. So the plaintiff must aver and prove that the prosecution claimed to be malicious is terminated in his favor. *Gorton v. De Angelis*, 6 Wend. 418; *Clark v. Cleveland*, 6 Hill, 344; *Hall v. Fisher*, 20 Barb. 441. Proof that the prosecution complained of was instituted through actual malice is not enough to sustain the action. *Foshay v. Ferguson*, 2 Denio, 617. In an action for malicious prosecution, the plaintiff must allege and prove both malice and a want of probable cause for the former suit. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. Want of probable cause and malice must concur,

and the former cannot be inferred from any degree of malice which may be shown. *Besson v. Southard*, 10 N. Y. 236; *Bulkeley v. Smith*, 2 Duer, 261. I allude to these familiar rules, not for the purpose of establishing their existence, but merely to bring to mind how strict and exacting the courts have been in enforcing them. In the present case I was of opinion at the trial that, in two at least of the particulars essential to constitute the cause of action, there was a lack of evidence to justify a recovery, and I am still of the same opinion. * * * The defendant has, I think, shown probable cause for the prosecution if he is its author, and the plaintiff (which is the real question) has not shown the want of probable cause for the charge. On both of the grounds, the absence of proof to show that the defendant was the real prosecutor, and, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, I am of opinion that the plaintiff was properly nonsuited, and had no legal right to ask a submission of the facts to the jury. * * * I think no legal error was committed at the circuit, and that a new trial should be denied, and the defendant have judgment.

MILLER, J., concurred. INGALLS, J., dissented.

(66 Me. 202.)

PULLEN V. GLIDDEN.

(*Supreme Judicial Court of Maine*. Feb. 19, 1877.)

MALICIOUS PROSECUTION—MALICE.

To maintain an action for malicious prosecution, plaintiff must prove malice in fact on the part of defendant, as distinguished from malice in law, which is established by legal presumption from proof of certain facts. But the plaintiff is not required to prove "express malice," in the popular signification of the term; as, that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards plaintiff. It is sufficient if he prove malice in its enlarged, legal sense, in which an act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.

On exceptions.

Action on the case brought by Willard W. Pullen against James S. Glidden for malicious prosecution. It appeared that defendant had made a complaint before a magistrate charging plaintiff with forgery, and that plaintiff was arrested, but, upon examination, was acquitted and discharged from arrest. Thereupon he brought this action. At the trial the jury found a verdict for defendant. Plaintiff alleged exceptions.

J. W. Knowlton, for plaintiff. L. M. Staples, for defendant.

LIBBEY, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was

malice; that the prosecution was malicious. Now, what is 'malice?' There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now, what is malice in law? Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent, from motives of ill will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted, popular sense, when proof of malice in its enlarged, legal sense was all that the law requires. To maintain his case, it was necessary for the plaintiff to prove malice in fact, as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in actions for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove "express malice," in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged, legal sense. "In a legal sense, any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Com. v. Snelling*, 15 Pick. 337. "The malice necessary to be shown, in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious." *Wills v. Noyes*, 12 Pick. 324. See, also, *Page v. Cushing*, 38 Me. 523; *Humphries v. Parker*, 52 Me. 502; *Mitchell v. Wall*, 111 Mass. 492. We think, from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by "express malice," in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

APPLETON, C. J., and DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

(2 Denio, 617.)

FOSHAY V. FERGUSON.

(Supreme Court of New York. May, 1846.)

1. MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE.

To maintain an action for malicious prosecution, plaintiff must prove, not only express malice on the part of defendant, but absence of probable cause for the prosecution.

2. SAME.

Probable cause is reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

3. SAME.

The next day after plaintiff had passed defendant's farm with a drove of cattle, it was discovered that some of defendant's cattle were missing, and defendant was informed that several cattle belonging to another person had been driven away, and that he had pursued the drove, and regained them from plaintiff. Defendant also pursued and overtook the drove, and found two of his cattle in it, which he charged plaintiff with stealing, and thereupon plaintiff paid defendant a large amount in cattle and money to settle the matter. *Held*, that there was probable cause for a subsequent charge, made by defendant against plaintiff, of stealing the two cattle, on which plaintiff was indicted; and that defendant was not liable to an action therefor, even though he acted maliciously, and although plaintiff was acquitted on trial of the indictment.

Motion for new trial.

Action for malicious prosecution in charging plaintiff with stealing cattle, for which he was indicted, but, on trial, was acquitted. It appeared that several of defendant's cattle, kept on his farm, under the charge of one Lambert, were discovered to be missing the next day after plaintiff had passed the farm with a drove of cattle; that some of the missing cattle were found in the route of the drove; that Lambert was told by one Gage that several of the latter's cattle had been driven away, and that he had pursued and overtaken the drove, and had regained his cattle, and the drover had settled with him; that Lambert went to defendant with this information, and they pursued the drove a distance of about 70 miles, and overtook it, and found in it two of defendant's yearling cattle; that plaintiff owned and was with the drove, and defendant charged him with stealing the cattle, and said he had a warrant for him, and would take him back; that plaintiff said he would rather settle it, and that on the next morning, they settled the matter, plaintiff giving defendant cattle to the value of \$200, and paying him in money the value of the two yearlings, which plaintiff kept. Soon afterwards defendant saw Gage, who told him of plaintiff's having driven off his cattle, and both expressed the opinion that all was not right with plaintiff. Plaintiff afterwards brought actions against defendant for slander in charging him with stealing the cattle, and to recover the value of the cattle which defendant had received on the settlement. Thereafter defendant went before the grand jury, and an indictment was found against plaintiff, but, on trial thereof, after hearing witnesses on both sides, plaintiff was acquitted. Subse-

quently plaintiff brought this action. The judge found a verdict for plaintiff for \$250. Defendant moved for a new trial.

H. Spencer and *J. A. Spencer*, for the motion. *M. T. Reynolds*, opposed.

BRONSON, C. J. There was evidence enough in the case to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is not enough, without showing also the want of probable cause. "Probable cause" has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. In *Swain v. Stafford*, 3 Ired. 289, and 4 Ired. 392, the action was brought against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made the defendant had received such information as induced a belief of the plaintiff's guilt, and although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported. The doctrine that probable cause depends on the knowledge or information which the prosecutor had at the time the charge was made has been carried to a great length. In *Delegal v. Highley*, 3 Bing. N. C. 950, which was an action for maliciously, and without probable cause, procuring a third person to charge the plaintiff with the criminal offense, the defendant pleaded specially, showing that the plaintiff was guilty of the offense which had been laid to his charge; and the plea was held bad in substance, because it did not show that the defendant, at the time the charge was made, had been informed or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. *Seibert v. Price*, 5 Watts & S. 438. Without going into particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle, and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action, if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offense. If the parties intended the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that

he made no complaint until the plaintiff commenced the two suits against him goes far to show that he was obnoxious to that charge, and that he was governed more by his own interest than by a proper regard to the cause of public justice. But, however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and, so long as it exists, it is a complete defense. There

is enough in the defendant's conduct to induce a rigid scrutiny of the defense. But if upon such scrutiny it appears that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported. On a careful examination of the case, I am of opinion that the verdict was clearly wrong. But, as the charge of the judge is not given, we must presume that the case was properly submitted to the jury, and a new trial can therefore only be had on payment of costs.

Ordered accordingly.

(See, also, *Vinal v. Core*, 18 W. Va. 1; *Vanderbilt v. Mathis*, 5 Duer, 304; *Abrath v. Northeastern R. Co.*, 11 Q. B. Div. 440, affirmed in *L. R.* 11 App. Cas. 247; *Hicks v. Faulkner*, 8 Q. B. Div. 167, affirmed in 46 Law T. [N. S.] 127; *Wheeler v. Nesbitt*, 24 How. 544; *Stewart v. Sonneborn*, 98 U. S. 187.)

Effect of advice of counsel.

(25 Pa. St. 275.)

WALTER V. SAMPLE.

(*Supreme Court of Pennsylvania*. 1855.)

MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF COUNSEL.

In an action for malicious prosecution, defendant, to avail himself of the defense that he acted under professional advice, must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted *bona fide* on the advice given. He thus negatives, if not the malice, the want of probable cause: and he is not liable, even though the facts did not warrant the advice and the prosecution.

Error to district court, Allegheny county.

Action on the case for malicious prosecution. At the trial, a member of the bar testified, on behalf of defendant, that the latter stated to him the facts of the case, and acted under his advice in instituting the alleged malicious prosecution. The court instructed the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." The jury found a verdict for plaintiff. Defendant assigned error in said instruction.

Marshall & Brown, for plaintiff in error.
J. T. Cochran, for defendant in error.

WOODWARD, J. This was an action on the case for malicious prosecution, and the only question presented by the record is whether the court were right in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." Ever since the case of *Farmer v. Darling*, 4 Burrows, 1971, it has been held that malice, either express or implied, and the want of probable cause, must both concur to support actions of this nature. The presumption of law is that every public prosecution is founded in probable cause, and the burden is therefore, in the first instance, on the plaintiff; but when he has submitted evidence of want of probable cause, or of circumstances from which a violent pre-

sumption would arise that it was wanting, the burden of proof is shifted onto the defendant, and then it is competent for him to show that he acted under professional advice. To make this defense available he must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted *bona fide* on the advice given. This proved, he negatives, if not the malice, the want of probable cause. I accede to the proposition, said BAYLEY, J., in *Ravenga v. Mackintosh*, 2 Barn. & C. 693, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, (however erroneous that opinion may be,) he is not liable to an action of this description. See the cases cited 2 Saund. Pl. & Ev. marg. pp. 659, 660. In *Sommer v. Wilt*, 4 Serg. & R. 24, Judge DUNCAN plainly intimated his opinion that such evidence would be a defense to the action, as negating the imputation of malice; and in the case of *Hall v. Smith*, reported in 7 Leg. Int. 7, the district court of Philadelphia treated such evidence as an answer to the imputation both of malice and want of probable cause, between which, it was said, there is no difference in the consideration of a matter of this kind. The opinion of Judge ROGERS at *nisi prius* in the case of *Le Maistre v. Hunter*, Brightly, N. P. 498, which seems to have been the authority followed by the court below, is not, when taken altogether, in conflict with the current of authorities. The facts are not given in reference to which he charged the jury in this language: "In conformity to a point put by counsel for the plaintiff, I instruct you that the opinion of private counsel of a prosecution cannot amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly stated. Even the application to counsel, and their opinion, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time

must be fair and full, and consistent with that purpose."

This is no more than a statement of the general rule, with its necessary qualifications. Nevertheless, the words, "unless the facts clearly warrant it," found both in Judge ROGERS' opinion and that under review, are ill chosen, because liable to misapplication. "Unless the facts clearly warrant" what? The opinion of counsel, or the prosecution? Whichever be the antecedent intended, it is apparent that these words would make the defense depend for its value wholly on the soundness of the legal opinion. If the facts must clearly warrant the legal opinion, that, to be a defense, must be the very judgment of the law on the facts; if they must clearly warrant the prosecution, then the defense is complete, without the professional opinion; and thus, either way, it goes for nothing. No matter how candidly and faithfully a prosecutor has submitted the facts to his legal adviser, and followed his advice, if they turn out insufficient for the support of the prosecution, he is liable in an action for malicious prosecution. On this principle, every acquittal of a defendant would be followed by such an action. A qualification of the rule in terms like these destroys the rule itself. The law is not so. Professors of the law are the proper advisers of men in doubtful circum-

stances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and, when the client is instructed that they do, he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party, it is important that he should resort to a professional adviser of competency and integrity. He is not, in the language of Judge ROGERS, to make such a resort "a mere cover for the prosecution;" but, when he has done his whole duty in the premises, he is not to be made liable because the facts did not clearly warrant the advice and prosecution. The testimony here was that Sample stated the facts of the case, and there is no suggestion on the record that they were not fairly stated. Suppression, evasion, or falsehood would make him liable; but if fairly submitted, and if the advice obtained was followed in good faith, he had a defense to the action, and the court should have given him the benefit of it.

The judgment is reversed, and a *venire de novo* awarded.

(See, also, *Folger v. Washburn*, 137 Mass. 60; *Smith v. Walter*, 125 Pa. St. 453, 17 Atl. Rep. 466; *Roy v. Goings*, 112 Ill. 656; *Forbes v. Hagman*, 75 Va. 168; *White v. Carr*, 71 Me. 555; *Hall v. Suydam*, 3 Barb. 83.)

Termination of the proceeding.

(109 Mass. 153.)

CARDIVAL V. SMITH.

(*Supreme Judicial Court of Massachusetts*.
Jan. Term, 1872.)

MALICIOUS PROSECUTION — TERMINATION OF PROCEEDING—CIVIL ACTION.

Where the plaintiff in a civil action, after maliciously and without probable cause procuring the arrest of the defendant on the writ therein, fails to have the writ returned into the office of the clerk of the court, or to appear at the court to which the writ was returnable, there is a final determination of the action, such that the defendant may maintain an action for malicious prosecution.

Appeal from superior court.

Action of tort by Peter Cardinal against Joseph W. Smith, brought in the superior court by writ dated November 26, 1869. The declaration alleged that defendant maliciously, and without probable cause, procured the arrest of plaintiff on a writ returnable to the superior court at September term, 1869; that plaintiff "duly appeared at said court to which said writ was returnable, but that the defendant did not appear, well knowing that he had no probable cause to maintain the action against the plaintiff, nor was said writ ever returned into the office of the clerk of said court." Defendant demurred to the declaration on the ground that it appeared "that the said suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of court." The superior court

sustained the demurrer. Plaintiff appealed.

C. Cowley, for plaintiff. G. Stevens, for defendant.

GRAY, J. The general rules of law governing actions for malicious arrest and prosecution have long been well settled. In the words of Lord CAMDEN, "this is an action for bringing a suit at law; and courts will be cautious how they discourage men from suing. When a party has been maliciously sued, and held to bail, malice, and that it was without any probable cause, must be alleged and proved." *Goslin v. Wilcock*, 2 Wils. 302, 307. "The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust." *Bull. N. P. 12*. When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown, and a *nolle prosequi* entered by the attorney for the government is not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. *Bull. N. P. 14*; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 Cush. 279; *Bacon v. Waters*, 2 Allen, 400. But if it is commenced by complaint to a magistrate who has jurisdiction

tion only to bind over or discharge, his record, stating that the complainant withdrew his prosecution, and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles v. Briggs*, 4 Mete. (Mass.) 421, 426. If the accused, after being arrested, is discharged by the grand jury's finding no indictment, that shows a legal end to the prosecution. *Jones v. Givin*, Gilb. 185, 220; *BULLER, J.*, in *Morgan v. Hughes*, 2 Term R. 225, 232; *Freeman v. Arkell*, 2 Barn. & C. 494, 3 Dowl. & R. 669; *Michell v. Williams*, 11 Mees. & W. 205; *Bacon v. Waters*, 2 Allen, 400. And if the prosecutor, after procuring the arrest, fails to enter any complaint, this, with the attending circumstances, is sufficient to be submitted to the jury as evidence of want of probable cause. *Venafra v. Johnson*, 10 Bing. 301, 3 Moore & S. 847, and 6 Car. & P. 50; *McDonald v. Rooke*, 2 Bing. N. C. 217, 2 Scott, 359.

When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against him. *Nicholson v. Coghill*, 4 Barn. & C. 21, 6 Dowl. & R. 12; *Watkins v. Lee*, 5 Mees. & W. 270; *Ross v. Norman*, 5 Exch. 359; *Bicknell v. Dorion*, 16 Pick. 478, 487; *Savage v. Brewer*, Id. 453. In *Arundell v. White*, 14 East, 216, it was held that an entry in the minute-book of the sheriff's court in London, opposite the entry of a suit in that court, that it was withdrawn by the plaintiff's order, was sufficient evidence of a termination of that suit to sustain an action for malicious prosecution. In *Pierce v. Street*, 3 Barn. & Adol. 397, the declaration, after setting out the suing out of a writ in an ordinary action at law against the plaintiff, and an arrest and holding to bail thereon, and alleging that it was done maliciously and without probable cause, averred that no

proceedings were thereupon had in that action, and that the plaintiff therein did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof; whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial of the action for malicious arrest, it appeared that no declaration was delivered or filed in the former action, and that this action was not commenced until a year after the return-day of that. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit to satisfy the averment in the declaration. But Lord LYNCHURST, C. B., thought there was, and overruled the objection; and his ruling was confirmed by the court of queen's bench, Lord TENNERDEX, C. J., saying, "The length of time which had elapsed shows that the suit was abandoned altogether;" and PARKE, J., "When the cause is out of court, it must be considered as determined." Our own statutes expressly provide that, if no declaration is inserted in the writ, or filed before or at the return term, it shall be a discontinuance of the action. Gen. St. c. 129, § 9. But the present case does not require us to consider what disposition must be shown of a civil action which has once been entered in court, in order to constitute a final determination thereof. A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a complaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. *Clark v. Montague*, 1 Gray, 446, 448; *Lombard v. Oliver*, 5 Gray, 8; *Jewett v. Locke*, 6 Gray, 233. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, it must be overruled.

(See, also, *Brown v. Randall*, 36 Conn. 56; *Clark v. Cleveland*, 6 Hill, 344; *Fay v. O'Neill*, 36 N. Y. 11; *Graves v. Dawson*, 153 Mass. 419; *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. Rep. 439; *Basébé v. Matthews*, L. R. 2 C. P. 654.)

(1 Abb. N. C. 193.)

MOULTON v. BEECHER.

(Supreme Court of New York. Sept., 1876.)

MALICIOUS PROSECUTION — TERMINATION OF PROCEEDING — INDICTMENT.

The complaint, in an action for a malicious prosecution of plaintiff by an indictment, alleged that a *nolle prosequi* had been entered as to the indictment, by leave of court, granted on the motion of the district attorney of the county in which the indictment was pending and triable, made by him "after consulting with defendant, and in compliance with his request." Held, that this was a sufficient averment of the termination of the criminal charge in favor of plaintiff.

Appeal from special term.

Action for malicious prosecution. The complaint alleged that defendant, falsely and maliciously, and without any reasonable or probable cause, charged plaintiff to the grand jury with having uttered and published, of and concerning defendant, certain criminal libels, and procured the grand jury to find and present an indictment against plaintiff therefor, and procured a warrant for the arrest of plaintiff upon said indictment, and procured plaintiff to be arraigned, and compelled him to plead to said indictment; "that plaintiff pleaded not guilty, and was then and ever since has been ready and anxious to stand trial on said indictment;" but that the

district attorney for the county in which the indictment was found and was triable, "after consulting with defendant, and in compliance with his request, but against the will and protest of plaintiff," moved the court to which the indictment had been transferred for prosecution and trial "that a *nolle prosequi* be entered as to said indictment, and the prosecution thereof against the plaintiff," and that said court "did then and there grant said motion; and it was thereupon adjudged and ordered by the said court that a *nolle prosequi* should be allowed and entered as to said indictment and prosecution against plaintiff, and the same was allowed and entered of record in said court," etc. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. On the hearing on the demurrer at special term, it was sustained. From the order and judgment entered thereon plaintiff appealed to the general term.

Argued before BARNARD and GILBERT, JJ.

Roger A. Pryor, for appellant. *Thomas G. Shearman*, for respondent.

BARNARD, J. It was essential to the maintenance of this action that the complaint should aver that the criminal prosecution alleged to have been instituted and prosecuted by defendant against the plaintiff has been terminated in favor of the plaintiff. This averment has no reference to the merits. It is a rule, doubtless, based upon the impropriety of permitting such an action while the prosecution complained of was proceeding to final adjudication in the proper court. It would be unseemly to permit an action for malicious prosecution which might be presented for trial before the action on which it was based was tried, and still more unseemly to permit the action after the proper court had determined the particular prosecution complained of in favor of the party who brought the same. After it is established that the action for malicious prosecution may be brought, the fact of the termination of the prosecution on which the action rests has no further relevancy. The plaintiff must then prove that the prosecution was instituted by the defendant

against the plaintiff without probable cause, and maliciously. The prosecution complained of in this action as falsely and maliciously made was a criminal prosecution. The plaintiff avers that the defendant falsely accused him of a criminal libel, and that he made the accusation maliciously. The criminal charge resulted in an indictment, and the complaint avers that the prosecution thereof has been terminated in the plaintiff's favor by the entry of a *nolle prosequi*, on motion of the district attorney of the county where the indictment was pending and triable, and with the leave of the court; that the motion was made "after consulting with defendant, and in compliance with his request." I think this was sufficient averment of the termination of the criminal charge in favor of the plaintiff. The district attorney of Kings county was charged with the duty of the prosecution. The defendant made his complaint with reference to this fact. The district attorney, at the request of the defendant, asked the court for leave to abandon the prosecution of the criminal charge against the plaintiff, and the court granted the motion, and the final order is entered. What is needed further to sustain the averment that the particular charge on which the action is brought is ended and in favor of the plaintiff? He asks for a trial, and the court and district attorney, with the defendant's concurrence, instead of a trial, order the entry of a *nolle prosequi* on the indictment. In other words, the district attorney asks leave to abandon the prosecution, and the court says he may. If the action complained of as malicious had been a civil action, an averment that a plaintiff had asked leave of the court to abandon it, and that such leave had been granted, would have been sufficient. The district attorney acts for the people in criminal cases, except that he must have leave of the court to enter the *nolle prosequi*. Where this leave is obtained, and the order is entered, it is a record promise by the people that the indictment will be no further prosecuted. I think the judgment at special term should be reversed, and the demurrer overruled, with costs.

GILBERT, J., concurred.

(The authorities differ on the question decided by this case. See *Langford v. Railroad Co.*, 144 Mass. 431, 11 N. E. Rep. 697; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. Rep. 728; *Murphy v. Moore*, [Pa.] 11 Atl. Rep. 665; *Garing v. Fraser*, 76 Me. 37.)

Malicious prosecution of a civil action.

(46 Ohio St. 367; 21 N. E. Rep. 356.)

POPE V. POLLOCK.

(*Supreme Court of Ohio*. March 26, 1889.)

1. MALICIOUS PROSECUTION—FORCIBLE ENTRY AND DETAINER.

An action may be maintained for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer, under the Ohio statute.

2. SAME—DAMAGES FROM PROSECUTION OF CIVIL ACTION.

Diverse doctrines compared as to whether an action will lie for a malicious and unfounded civil

action, when there has been no deprivation of liberty or taking of property.

Error to circuit court, Hamilton county.

The action below was commenced July 3, 1885, by the filing in the court of common pleas of a petition which charged in substance that, in March, 1885, the plaintiff, by written agreement, leased of a Mrs. Brayton, through defendant, as her agent, for a term to expire April 1, 1886, a lot in the county of Hamilton, on which was a dwelling-house and other buildings; that

the plaintiff immediately entered into possession, which has since continued, except that, during a portion of the time, the defendant unlawfully kept plaintiff out of a portion of the premises. On the 11th of May, 1885, defendant, in her own name, instituted a suit in forcible entry and detainer, before a justice of the peace of Cincinnati township, said county, for the recovery of possession of said premises, which suit terminated in a verdict for the plaintiff of "not guilty." Afterwards, on the 17th of June, 1885, defendant instituted another like suit before a justice of the peace of Springfield township, said county, which also terminated in a verdict for this plaintiff of "not guilty." Each of said actions was prosecuted maliciously, and without probable cause. The plaintiff, by reason thereof, was greatly harassed and annoyed, much worried and troubled in mind, was injured in reputation among his neighbors, was caused great inconvenience and much loss of time, and put to considerable money outlay, in defending said actions. Then follows a prayer for judgment. To this petition a general demurrer was filed, which was sustained by the court of common pleas, which judgment was affirmed in the circuit court. To procure a reversal of these judgments, this error proceeding is prosecuted.

Wm. H. Pope, for plaintiff in error.
John A. Shank, for defendant in error.

SPEAR, J., (after stating the facts as above.) Will the prosecution of a suit in forcible entry and detainer, which results in a verdict for the defendant, where the same is prosecuted maliciously, and without probable cause, afford ground for an action in the nature of a suit for malicious prosecution? is the question in this case. The more common causes for actions for malicious prosecution are groundless and malicious prosecutions of criminal charges. But that actions of this kind can be maintained where there has been an unjustifiable and malicious seizure of the property of the complaining party, as well as of the person, there is no question. Whether or not such an action may be maintained where there has been no deprivation of liberty, or of the possession, use, or enjoyment of property, has been the subject of much discussion, and of contrary holdings. It appears that in England, by the common law, prior to the statute of Marlbridge, 52 Hen. III., (1259,) actions of this character were allowed, but since the passage of that statute, which gave the successful defendant judgment for costs against the plaintiff, the right to maintain such actions has been uniformly denied, it being held that if one prosecutes an ordinary civil action against another maliciously, and without reasonable or probable cause, an action for the resulting damage is not maintainable. So, too, in this country, many decisions of like tenor have been made. The courts have said that courts of law are open to every citizen, and that the costs which the defendant gets are a compensation for the wrong. If every suit may be retried on an allegation of malice, the evil would be intolerable, and the malice in

each subsequent suit would be likely to be greater than in the first; and that, if a defendant ought to have damages upon a false claim, then the plaintiff ought to have damages on a false plea, which would make litigation interminable. *Beauchampe v. Croft*, Keilw. 26; *Fitzh. Nat. Brev.* 429; 1 *Bac. Abr.* 141; *Savil v. Roberts*, 1 *Salk.* 14; *Bull. N. P.* 11; *Parker v. Langley*, Gilb. Cas. 163; *Goslin v. Wilcock*, 2 *Wils.* 305; 1 *Amer. Lead. Cas.* 231, note; *Cooley, Torts*, 189; *Townsh. Sland. & L.* § 410; *Taylor v. Wilson*, 1 *N. J. Law*, 362; *Woodmansie v. Logan*, 2 *N. J. Law*, 68; *Kramer v. Stock*, 10 *Watts*, 115; *Thomas v. Rouse*, 2 *Brev.* 75; *Ray v. Law. Pet. C. C.* 207; *Potts v. Imlay*, 4 *N. J. Law*, 330; *McNamee v. Minke*, 49 *Md.* 122; *Muldoon v. Rickey*, 103 *Pa. St.* 110; *Wetmore v. Mellinger*, 64 *Iowa*, 751, 18 *N. W. Rep.* 870; *Bitz v. Meyer*, 40 *N. J. Law*, 252; *Mayer v. Walter*, 64 *Pa. St.* 283.

Where such suits have been maintained, the right has been placed upon the ground that taxable costs, including, as in most states, but the fees of witnesses and officers of the court, afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit, and no remedy at all to repair the injury received. It is upon this principle, in part, that actions have even been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. Where an action is brought and prosecuted maliciously, and without probable cause, it is an abuse of legal process, and the plaintiff asserts no claim in respect to which he has any right to invoke the aid of the law. It is a wrong to disturb one's property or peace; and to prosecute one maliciously and without probable cause is to do that person a wrong. The common law declares that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character. When the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of defendant's damage, and the defendant but stands upon his legal rights when he calls upon the plaintiff to prove his case to the satisfaction of judge and jury. *Vanduzor v. Linderman*, 10 *Johns.* 106; *Pangburn v. Bull*, 1 *Wend.* 345; *Whipple v. Fuller*, 11 *Conn.* 582; *Closson v. Staples*, 42 *Vt.* 209; *Marbourg v. Smith*, 11 *Kan.* 554; *Bigelow, Torts*, (2d Ed.) 71; *Smith v. Smith*, 56 *How. Pr.* 316; *Bump v. Betts*, 19 *Wend.* 421; *Woods v. Finnell*, 13 *Bush*, 628; *Hoyt v. Macon*, 2 *Colo.* 113; *Payne v. Donegan*, 9 *Ill. App.* 566; *McCardle v. McGinley*, 86 *Ind.* 538; *Juchter v. Boehm*, 67 *Ga.* 524; *Lawrence v. Hagerman*, 56 *Ill.* 68; *Atwood v. Monger*, *Style*, 378. See, also, an able review of the subject by John D. Lawson, Esq., of the St. Louis bar. 21 *Amer. Law Reg.* 281. There seems, as will appear by reference to these citations, abundant authority in other states of the Union to support the proposition that a suit may be maintained for damages arising from the prosecution of an ordinary civil action, when the same is done maliciously, and without

probable cause, but without disturbance to person or property. The precise question has not been made in Ohio, though in two cases (*Tomlinson v. Warner*, 9 Ohio, 104, and *Fortman v. Rottier*, 8 Ohio St. 548) this court has held that an action may be maintained for maliciously, and without probable cause, suing out and levying a writ of attachment. So, when one has been wrongfully deprived of the use of his land by the prosecution, maliciously and without probable cause, of an injunction proceeding, the court held (*Coal Co. v. Upson*, 40 Ohio St. 17) that an action for malicious prosecution will lie. The language of the opinion (page 25) is: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment of property of value." It will be noted that, where damages for the prosecution, maliciously and without probable cause, of an ordinary civil action, are refused, one of the principal reasons given is that the allowance of taxed costs is regarded as sufficient punishment to the plaintiff for prosecuting, and recompense to the defendant for defending, such an action. In England the taxed costs which may be awarded to a successful defendant include not only fees of court officers and witness, but attorney's charges for preparing the case for trial, and the *honorarium* of the barrister who tries it; and in a number of American states a like taxation of costs prevails. But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial, to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred, for in cases where damages may be recovered for malicious injury, fees of counsel, as well as court costs, are included in compensatory, and not punitive, damages. The reason for the rule having failed, there is much ground for saying that the rule itself fails. But there is no necessity in the present case for a determination of the question whether or not an action will lie for the malicious prosecution of an ordinary civil action, without probable cause, where there is no arrest or seizure, for the petition of the plaintiff makes a different case. In many of its aspects, an action in forcible entry and detainer is an extraordinary proceeding. It is summary in its character, and may become, when prosecuted wrongfully, excessively annoying and harassing. Having given three days' notice in writing to leave the premises, the plaintiff may commence his action by filing a complaint with a justice of the peace, and in three days more the trial may take place. See section 6599, Rev. St., and following. The complaint need not be sworn to. If a continuance is asked by defendant for more than eight days, security for

payment of rent is required. The action may involve the possession by a defendant of a home for himself and a dependent family. A failure to answer, or an unsuccessful defense, may result in immediate and forcible ouster, and this without reference to the condition of the family, or the weather, or other surrounding circumstances. No appeal is allowed, nor is one action a bar to subsequent actions. The contingency of preparing a bill of exceptions must be anticipated, and counsel procured for that; else a review of erroneous holdings cannot be had. Error can be prosecuted only by leave of a judge, and such proceeding raises questions relating to competency of evidence only, and not questions touching the weight or sufficiency of the evidence. The justice is not even bound to sign a bill where the objection is only that the judgment is not sustained by sufficient evidence. If petition in error is allowed to be filed, the party must be ready with security, if exacted, to stay execution of the judgment against him. Then, too, the plaintiff may select from several concurrent jurisdictions within the county. He may commence his action, if he so desire, in the township furthest removed from the residence of the defendant, or the one most inaccessible, thus requiring, it may be, his adversary to travel long distances, and to transport his witnesses at large expense. Failing in one action thus brought, he may continue prosecutions until his pocket-book or his malice, or both, become exhausted. Plainly, in the hands of an unscrupulous prosecutor, possessed of abundant means, this kind of action may become grievously oppressive, and it is idle to say that the small bill of costs before a justice is either a sufficient punishment to inflict upon a malicious prosecutor, or constitutes any recompense to a wronged defendant. The statute gives to such plaintiff the right to resort to his action as often as he may choose, and to bring it before any justice within the county, but this implies no right to prosecute maliciously and without probable cause. A groundless action, prosecuted with malice, is never justifiable, and a wrong suffered by such prosecution in forcible entry and detainer should not be without remedy. Nor is there force in the objection, as applied to this case, that intolerable evils would arise from a multiplicity of suits thus encouraged. The law-making power has seen fit to provide by this statute that a judgment shall not be a bar to any after action. We have, in this provision, legislative declaration to the effect that evils may not be expected to follow repeated trials of issues, under this statute. In consonance with this policy, it may be reasonable to conclude that, if repeated actions to determine the right to possession will not work intolerable evils, a review of the facts by a suit for malicious prosecution will not have that effect. At all events, the right to so review will naturally tend to check any evils that might flow from a misuse of the statutory right to repeated trials.

Judgment reversed.

(19 Wend. 421.)

BUMP v. BETTS.

(Supreme Court of New York. May, 1838.)

MALICIOUS PROSECUTION — ATTACHMENT AGAINST PROPERTY.

The rule that plaintiff, in an action for a malicious prosecution, must show the determination of such prosecution in his favor, does not apply where the proceeding was by attachment against his property, in his absence, and he had no opportunity to defend. A judgment against him, under such circumstances, is not conclusive evidence of probable cause or of want of malice, as in cases of personal service of process.

Motion for new trial.

Action on the case for malicious prosecution. It appeared that defendant, in the absence of plaintiff, procured an attachment against plaintiff's property, alleging as ground therefor that plaintiff, being a resident of the county, had departed therefrom with intent to defraud his creditors; and that, in the action thus commenced, defendant obtained judgment against plaintiff, and caused execution to be issued thereon, and the property of plaintiff to be sold. Plaintiff gave evidence tending to show that the demand on which the action was brought and the judgment was obtained had been paid by him before the proceedings were commenced. Defendant made a motion for a nonsuit, which was granted, the judge holding that the presumption of want of probable cause, arising from the fact of payment, was rebutted by the judgment recovered by defendant and remaining unreversed, and that no malice was shown, and a nonsuit was entered accordingly. Plaintiff moved to set aside the nonsuit, and for a new trial.

J. A. Spence, for the motion. R. B. Bates, opposed.

NELSON, C. J. This action lies against any person who maliciously, and without probable cause, prosecutes another, where-

by the party prosecuted sustains an injury, either in person, property, or reputation. 1 Selw. N. P. 806; Saund. Pl. & Ev. 651; 2 Chit. Pl. 248, note r; Savill v. Roberts, 12 Mod. 208; Payne v. Partridge, 1 Salk. 12; Sutton v. Johnstone, 1 Term R. 493, 550. As a general rule, the plaintiff must aver in his declaration, and prove on the trial, the determination of the former suit in his favor, (Saund. Pl. & Ev. 858; 2 Chit. Pl. 245, note e,) though the omission of the averment would be cured after verdict, (1 Saund. Pl. & Ev. 228b, note 1.) See, also, Poynton v. Forster, 3 Camp. 61, note b. The reason for this proof is obvious, for otherwise he might recover in this action, and still be convicted or have judgment against him in the former suit. Fisher v. Bristow, 1 Doug. 215. But it does not apply where the malicious prosecution complained of arises out of proceedings on attachment, in the absence of the party defendant, in which no opportunity is afforded him to defend the suit. A judgment against him, under such circumstances, cannot be deemed conclusive evidence of probable cause, or want of malice, as in cases of personal service of process. The rule was first laid down in reference to these cases, and, when thus confined, is a sound one, but altogether inapplicable in respect to alleged malicious suits under this new statute remedy given to a plaintiff. The reason of the rule ceasing, the rule itself should give way, and must, or this mode of redress for a wrong, more likely to be committed in *ex parte* proceedings than in litigated cases, must be denied. It is obvious the damage to the party in the former instance will usually be much more serious than in the latter. In the one case there will be a recovery against him for such amount as his adversary, on an *ex parte* hearing, thinks proper to demand, while in the other he is subjected only to the costs of a defense. New trial granted, costs to abide the event.

(See, also, Hyde v. Greuch, 62 Md. 577; Steward v. Gromett, 7 C. B. N. S. 191.)

Malicious abuse of process.

(4 Bing. N. C. 212.)

GRAINGER v. HILL *et al.*

(Court of Common Pleas. Jan. 20, 1838.)

1. ABUSE OF PROCESS—ARREST.

Sheriff's officers, having a writ for the arrest of plaintiff in an action brought by defendants against him, came to plaintiff, who was ill in bed, and told him that, unless he would deliver up a certain document or find bail, they must either take him or leave a man with him. Held, that this was a sufficient restraint on plaintiff's person, without actual contact, to amount to an arrest, which would sustain an action by plaintiff for a malicious abuse of the process; and that defendants, having repaid to plaintiff, on a settlement between them, the caption fee charged to him by the officers, thereby admitted the propriety of such charge.

2. SAME—TERMINATION OF PROCEEDING—WANT OF PROBABLE CAUSE.

In an action for abusing the process of the court in order illegally to compel a party to give up his property, it is not necessary to prove that

the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause.

Motions for entry of nonsuit instead of verdict for plaintiff, and in arrest of judgment.

Action on the case by Grainger against Hill and another. Defendants pleaded the general issue. At the trial it appeared that in September, 1836, plaintiff, by deed, mortgaged to defendants for £80, being money loaned by them to him, a vessel of which he was owner and master. The money was to be repaid in September, 1837; and plaintiff was to retain the register of the vessel in order to pursue his voyages. In November, 1836, defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register; and for this purpose, after threatening to arrest the plaintiff

unless he paid the money, they made an affidavit of debt, sued out a *capias* indorsed for bail in the sum of £95. 17s. 6d. in an action of *assumpsit*, and sent two sheriff's officers with the writ to plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away; leave the young man with him." The officers then told plaintiff they had not come to take him, but to get the ship's register; but that if he failed to deliver the register, or to find bail, they must either take him or leave one of the officers with him. Plaintiff, being unable to procure bail, and being much alarmed, gave up the register. Plaintiff afterwards came to an arrangement with defendants; was discharged from the arrest; repaid the money borrowed on mortgage; and received from defendants a release of the mortgage deed. No further steps were taken in the action of *assumpsit*. Upon this arrangement, a caption fee which had been charged and paid by plaintiff to the sheriff's officers was repaid by defendants to plaintiff. The jury found a verdict for plaintiff. Counsel for defendants, pursuant to leave, moved to enter a nonsuit instead of the verdict, and also moved in arrest of judgment, and obtained a rule to show cause.

Mr. Talfourd, Serj., and Mr. James, showed cause. Mr. Taddy and R. V. Richards, in support of the rule.

TINDAL, C. J. This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendants for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the mean time, the plaintiff should retain command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff, through duress, to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95. 17s. 6d., and kept him imprisoned until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained, by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground,—under an application for a nonsuit, and in arrest of judgment.

The first ground urged for a nonsuit is that the facts proved with respect to the writ of *capias* do not amount to an arrest. It appears to me that the arrest was sufficiently established. The facts are that the

sheriff's officer comes with a *capias* to the plaintiff, when he is ill in bed, and tells him that, unless he delivers the register or finds bail, he must either take him or leave a man with him. Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows that the plaintiff was in a situation in which bail was to be procured. That was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's *Nisi Prius*, p. 62, goes the full length: "If the bailiff, who has a process against one, says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." But the matter does not rest there; for, upon the suit being arranged, a caption fee, which had been charged by the officer to the plaintiff, was repaid to him by the defendants, who thereby admit the propriety of the charge.

The second ground urged for a nonsuit is that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendant's proceeding, is the same: that this is an action for abusing the process of the law by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff, at least, is instructed to pursue the exigency of the writ. Here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances, and, his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal were necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and therefore this rule must be discharged.

PARK, VAUGHAN, and BOSANQUET, JJ., concurred.

(See, also, *Wood v. Graves*, 144 Mass. 365, 11 N. E. Rep. 567; *Page v. Cushing*, 38 Me. 523; *Bebinger v. Sweet*, 1 Abb. N. C. 263; *Hazard v. Harding*, 63 How. Pr. 326.)

CONSPIRACY.

(52 N. J. Law, 284; 20 Atl. Rep. 485.)

VAN HORN *et al.* v. VAN HORN *et al.*

(Supreme Court of New Jersey. Oct. 15, 1890.)

1. CONSPIRACY—MALICE.

An action will lie for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages.

2. SAME.

The *gravamen* in such an action is not the conspiracy, but the malice; the former is matter of aggravation or inducement only, in the pleading and evidence, under which one or all of the defendants may be found guilty.

Case certified from circuit court, Essex county; before Justice DEPUE.

The defendants, Amos H. Van Horn and Casper Soer, Jr., were summoned to answer James Van Horn, and Emma D. Van Horn, his wife, in tort, for a conspiracy or combination to break up the wife's separate business of selling fancy goods on consignment at Newark. Two firms of wholesale jobbers in fancy and millinery goods had agreed verbally to supply her on credit with a stock of such goods, to be sold by her on commission, limiting the total amount to \$2,500. One of said firms had, in pursuance of the agreement with her, sent \$500 worth of goods, which were received and placed in her store for sale, and she was daily expecting the balance. With this prefatory statement, the declaration charges that the defendants, maliciously intending to injure and drive the said Emma D. Van Horn out of business, and into public scandal, shame, and disgrace, and to injure her in her credit and business, and to prevent her from acquiring any profit or gain therefrom, or from continuing the same, did maliciously conspire, combine, and agree to prevent her from enjoying and continuing her business, and in pursuance of said conspiracy, etc., did entice into their store in Newark one of the plaintiffs' employes, and by artful persuasion and threats induced her to tell where the plaintiff's stock of goods was purchased, telling her the stock would be taken from her, and the business closed up; and, in pursuance and in further performance of their unlawful intent and combination, endeavored to prevent the customers and friends of the plaintiff from dealings with her, by falsely and fraudulently representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor, and by sending threatening notes and messages to them, designed to intimidate them from having any dealings with her, and did threaten to pursue her until she was ruined. That in further pursuance of such combination, and by means of fraud and deceit, they did persuade the said firm in New York to decline to complete their contract, and did prevail on them, by

means of corrupt, fraudulent, and deceitful representations and statements as to the personal and business character and standing of the plaintiff, to remove the stock already supplied her, and refuse to deliver her other goods as agreed for, leaving her entirely without any stock to sell, or customers to purchase from her, by means whereof she was left without stock and credit with the said firms, and could not obtain goods from other parties, and was driven out of her business and occupation, and deprived of the profit and livelihood which she was making and daily increasing. To this declaration a general demurrer was filed, and joinder added.

Argued at February term, 1890, before BEASLEY, C. J., and DEPUE and SCUDDER, JJ.

R. H. McCarter, for plaintiffs. Samuel Kalisch, for defendants.

SCUDDER, J. The merely formal parts of this declaration will not be considered on the general demurrer, but the whole will be examined to determine whether it sets forth in substance a legal cause of action. The case has been elaborately discussed by counsel, because the principles involved may affect other cases of even greater importance than this, and lead to serious complications where actions are brought, between rivals in business, or those who interfere with the ordinary course of trade to the detriment of others. A careful consideration of the subject has led me to the conclusion that this case is readily distinguishable from many that have been cited in the argument, and does not involve many of the questions that have been presented. It is not necessary to consider the office of the ancient writ of conspiracy, and the process by which, in time, it was superseded by the later and more efficacious action on the case for conspiracy, and the still more modern action for malicious prosecution. Nor will it now be advantageous to show how long and difficult it was to separate the idea of a criminal conspiracy at common law, where the agreement or conspiracy was the *gravamen* of the offense, from the real complaint in a civil action, that the combination of two or more persons has enabled them to inflict a great wrong on the plaintiff. The combination or conspiracy in the latter case was therefore a matter of aggravation or inducement only, of which one or all might be found guilty; while in the former it was essential to show that two or more had joined in an agreement to do an unlawful act, or to do a lawful act in an unlawful manner. The distinction is now well established that in civil actions the conspiracy is not the *gravamen* of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and

enabling him to recover against all as joint tort-feasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement. *Pollock on Torts*, 267; *Garing v. Fraser*, 76 Me. 37; *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124. The declaration begins in this form, and is unexceptionable in this particular. It is an action on the case setting forth a malicious conspiracy or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. No further specification is required than the general terms in which it is pleaded in the declaration.

We have not presented for determination in this pleading the vexed question whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result and did result to the plaintiff. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333. In the opinion of Mr. Pollock, *ubi supra*, the difficulties in such cases disappear, or are greatly reduced, when the cause of action is considered as belonging to the class in which malice, in the sense of actual ill will, is a necessary element. Here the whole pleading is based on the malicious conduct of the defendants in destroying the plaintiff's credit and patronage, and breaking up her business and means of livelihood. The case is, however, further distinguished from the cases cited above, and separated from the questions of difficulty involved in some of them, because here no breach of contract is alleged. There was no binding contract between the New York firms and the plaintiff upon which they could be sued for a breach. Where there is a sublecontract between a contractor and contractee, there is difficulty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract resulting in damages to him. The plaintiff Emma D. Van Horn, it is alleged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her, it does not appear that she could have any

remedy against them. They could send or recall them at pleasure. The complaint here is that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended, by the fraudulent and malicious act of the defendants. If she have no remedy against the defendants, she can have none against others for the wrong which she claims she has suffered. The difference between this action and slander is well stated in *Riding v. Smith*, 1 Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader carrying on business, founded on an act done by the defendant which led to the loss of trade and custom by the plaintiff. It was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop. Upon the whole case presented in the declaration, *Mogul Steam-Ship Co. v. McGregor*, 21 Q. B. Div. 544, 23 Q. B. Div. 598, is important to aid in preserving the distinction between injuries caused by mere rivalries in business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice towards him. In the first report, Lord Chief Justice COLERIDGE says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report Lord Justice FRY, after a full statement of cases, says that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. Lord ESHER, M. R., dissented. It was decided that the exclusion of the plaintiffs, rival freighters, from participation in a 5 per cent. rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable. The basis of action seems here to be, as stated in the declaration, the fraudulent and malicious acts of the defendants in driving the plaintiff Emma D. Van Horn out of her business. The statements of the means used to effect this purpose all combine to produce a single cause of action, and are not objectionable for duplicity. But if there were duplicity in the pleadings, this is not ground for a general demurrer.

The demurrer should be overruled.

(See, also, *Wildee v. McKee*, 111 Pa. St. 335, 2 Atl. Rep. 108; *Lee v. Kendall*, 11 N. Y. Supp. 131, 56 Hun, 610; *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. Rep. 401; *Engstrom v. Sherburne*, 137 Mass. 153; *Rundell v. Kalbfus*, 125 Pa. St. 123, 17 Atl. Rep. 238; *Verplanck v. Van Buren*, 76 N. Y. 259.)

SLANDER AND LIBEL.

I. SLANDER.

A. SLANDER PER SE.

1. Charge of crime.

(3 Hill, 21.)

YOUNG V. MILLER.

(Supreme Court of New York. May Term, 1842.)

1. SLANDER—WORDS IMPUTING CRIME—THE GENERAL AMERICAN RULE.

Words imputing a charge which, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, are in themselves actionable.

2. SAME—CHARGE OF REMOVING LANDMARK.

The removal of a landmark being made by statute (2 Rev. St. N. Y. pp. 695, 697, §§ 32, 40) indictable as a misdemeanor and punishable by fine and imprisonment in the county jail, and also involving moral turpitude, words charging a person with that offense are actionable *per se*.

Demurrer to declaration.

Action for slander. The defamatory words alleged in the declaration to have been spoken by defendant of and concerning plaintiff were as follows: "You [the said plaintiff meaning] have removed my landmark, [meaning the monument to designate the corner or boundary of defendant's land.]" "You [the said plaintiff meaning] have removed my landmark, [meaning the monument of said defendant's land,] and I [the said defendant meaning] can prove it." Also the latter words, with the addition, "by George Wilkins." Also the same words, with the addition, "and cursed is he that removeth his neighbor's landmark." Also, "Cursed is he that removeth his neighbor's landmark, and you [the said plaintiff meaning] have done it;" meaning that plaintiff had removed the monument of defendant's land, and thereby then and there meaning to charge plaintiff with the offense of willfully and maliciously removing the monument designating the corner or other point in the boundary of defendant's land. Defendant demurred to the declaration on the ground that the words were not actionable in themselves, and that there was no allegation of special damage. Plaintiff joined in demurrer.

N. Hill, Jr., and *S. Stevens*, in support of the demurrer. *W. A. Beach*, opposed.

Bronson, J. There has been much discussion in the books upon the question, what words are actionable in themselves, when not spoken of the plaintiff in his office, profession, or calling? But it will be unnecessary to examine the cases at large, for the reason that a rule has been laid down and acted upon in this state, which, although not entirely satisfactory to my mind, I feel bound to follow. In *Brooker v. Coffin*, 5 Johns. 188, the court, "upon the fullest consideration," laid

down the following rule: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." In *Widrig v. Oyer*, 13 Johns. 124, the counsel proposed to modify the rule by changing "or" into "and," but the court did not yield to the suggestion. The rule was repeated and followed in *Martin v. Stillwell*, 13 Johns. 275, where words were held actionable which charged the plaintiff with keeping a bawdy-house. Such a house is a common nuisance, and the person keeping it may be punished by indictment. In *Gibbs v. Dewey*, 5 Cow. 503, the charge was that the plaintiff had handed papers to a juror to influence or bribe the jury, and the words were held actionable. In *Alexander v. Alexander*, 9 Wend. 141, the charge was that the plaintiff had forged the defendant's name to a petition to the legislature; and, although the imputed offense was only a misdemeanor, and not a felonious forgery, the words were held actionable. In all of these cases the court went upon the ground that the words imputed "a crime involving moral turpitude," and for which the offender might be proceeded against by indictment.

Removing a landmark seems not to have been an offense at the common law, nor was it made so by statute until 1830, when it was enacted that "every person who shall willfully or maliciously remove any monuments of stone, wood, or other durable material, erected for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, shall, upon conviction, be adjudged guilty of a misdemeanor." The punishment is fine and imprisonment in the county jail. 2 Rev. St. pp. 695, 697, §§ 32, 40. And, as in most other cases of crime, the prosecution is by indictment. The charge which has been made against the plaintiff, if true, will subject him to punishment by indictment; and the next inquiry is whether the imputed crime is one "involving moral turpitude."

Removing landmarks was forbidden among the Jews, and a curse was denounced upon the offender. Deut. xix. 14, and xxvii. 17; Job, xxiv. 2; Prov. xxii. 28, and xxiii. 10. The learned and venerable Doctor Scott, in his commentary upon the first-mentioned passage, says: "As landmarks constituted the customary method of distinguishing landed property in those days, removing them would be a crime among the Israelites similar to

forging, altering, destroying, or canceling the title-deeds of estates at this day; and would occasion atrocious injustice, and make way for dispute and lawsuits." And in his remarks upon Prov. xxii. 28, he calls the offenders "robbers." Mr. Henry, in his commentary upon Deut. xix. 14, says: "Though the landmarks were set by the hands of men, yet he was a thief and a robber, by the law of God, that removed them." And in his comments upon Job, xxiv. 2, he says the offense is equivalent to that of "forging or destroying deeds." Doctor Adam Clark, in his commentary upon these passages, has taken nearly the same view of the question, though he has not been quite so severe upon the offenders. But this is a subject upon which it cannot be necessary to multiply authorities. There is evidently no great difference, in a moral point of view, between altering the courses and distances in a deed, for the purpose of depriving the owner of a part of his land, and producing the same result by changing the visible bounds of his estate. The one is a forgery on paper, and the other upon the face of the earth, and when either of these wrongs is done for the purpose of acquiring the property of another, the offender may justly be regarded as a thief as well as a forger. All men must agree that the crime of removing landmarks is one involving a high degree of moral turpitude; and, as it is an indictable offense, the case falls plainly within a rule from which we are not at liberty to depart. The demurrer does not point out any defect in the form of the declaration, and I am inclined to think it sufficient. The defendant must have intended to charge the plaintiff with a criminal offense. *Miller v. Miller*, 8 Johns. 74, 77; *Niven v. Munn*, 13 Johns. 48; *Goodrich v. Woolcott*, 3 Cow. 231, 5 Cow. 714; *Gibbs v. Dewey*, Id. 503.

The plaintiff is entitled to judgment.

COWEN, J. I concur in the views expressed by Mr. Justice Bronson on the question raised by the demurrer. It was contended on the argument that the cases in this court which sanction an action of slander for words imputing a misdemeanor intend those misdemeanors only to which the common or statute law now, or the common law heretofore, attached legal, as contradistinguished from moral, infamy. I understand those cases as laying down a rule of much greater compass, — one which comprehends every indictable offense, which is at the same time infamous or disgraceful in a general sense; any offense which detracts from the character of the offender as a man of good morals. I admit that this principle covers a wide field of litigation. Perhaps it extends beyond what was once understood to be the true boundary. But the objection that the law will not tolerate the uncertainty thus introduced is weakened by the manner in which the same law deals with actions like the present in kindred cases. Fluctuating as the rules of conduct prescribed by the moral code may be, they are every day judicially recognized as the test of actions for printed slander, without the

technical limit required by the rule now in question. There the offense imputed need not be even indictable or legally punishable in any way; and a writing or picture alluding to a mere foible may be the subject of an action, if intended to bring the party into contempt or ridicule.

NELSON, C. J., also concurred.
Judgment for the plaintiff.

(11 Q. B. Div. 609.)

WEBB v. BEAVAN.

(*Queen's Bench Division*. May 30, 1883.)

SLANDER — WORDS IMPUTING CRIME — THE ENGLISH RULE.

Words imputing a criminal offense punishable corporally are actionable *per se*, even though such offense be not punishable by indictment.

Demurrer to statement of claim.

Action for slander. The statement of claim alleged that defendant maliciously and falsely spoke and published of plaintiff the words following: "I will lock you [meaning the plaintiff] up in Gloucester gaol next week. I know enough to put you [meaning the plaintiff] there, [meaning thereby that the plaintiff had been and was guilty of having committed some criminal offense or offenses.]" Plaintiff claimed £500 damages. Defendant demurred, on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Plaintiff joined in demurrer.

W. H. Nash, in support of the demurrer.

To make the words actionable, the innuendo should have alleged that they imputed an offense for which plaintiff could have been indicted. It was not sufficient to allege that they imputed a criminal offense merely. *Odger, Sland. & Lib.* p. 54.

Hammond Chambers, opposed.

According to the earlier authorities, the test, in ascertaining whether words were actionable *per se*, was whether the offense was punishable corporally or by fine. It was not necessary to allege that the words imputed an indictable offense. *Com. Dig. tit. "Action on the Case for Defamation," D 5, 9; Curtis v. Curtis*, 10 Bing. 477.

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offense" seems to have crept into the text-books, but I think the passages in *Comyns' Digest* are conclusive to show that words which impute any criminal offense are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offense. A great number of offenses which were dealt with by indictment 20 years

ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

(3 Hill, 139.)

CHASE v. WHITLOCK.

(*Supreme Court of New York*. July Term, 1842.)

SLANDER — WORDS IMPUTING CHARGE OF SWINDLING.

To say that a person is a "swindler" is not actionable *per se*; the word being merely equivalent to "cheat," and not necessarily implying the crime of obtaining goods under false pretenses.

Demurrer to declaration.

Action for slander. The declaration alleged, in its first count, the speaking by defendant of the words, "Chase is a black-leg and swindler; here is Stephen Potter's letter to confirm it;" with the innuendo that plaintiff had been guilty of the crime of swindling; and in the second count the words, "Chase is a black-legged swindler; his agent refused to do his business; here is Potter's letter, which I will show you, confirming the fact;" with the innuendo that plaintiff had been guilty of the crime of swindling; and defendant was so understood by the people who heard the words. Defendant demurred to the declaration. Plaintiff joined in demurrer.

N. Hill, Jr., in support of the demurrer. T. McVean, opposed.

BRONSON, J. There is no *colloquium* of obtaining goods by false pretenses, nor is there anything else to show that the words were used in any other than their ordinary sense. Swindling is not a crime known to our law. The word "swindler" is an exotic, which came from Germany, and has but recently become naturalized in our language. In Todd's Johnson, "swindler" is defined to be "a sharper; a cheat;" and to swindle, "to cheat; to impose upon the credulity of mankind, and thereby to defraud the unwary by false pretenses and fictitious assumptions." Webster defines "swindler" as "a cheat; a rogue; one who defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice." And in Tomlin's Law Dictionary (Ed. 1836) the word is defined, "a cheat; one who lives by cheating." To call one a "swindler" is about equivalent to saying he is a "cheat," which has never been held actionable. Either of those charges may, under certain circumstances, imply that the accused is guilty of the crime of obtaining goods by false pretenses. But they do not necessarily mean so much. There are many ways in which a man may wrong another in such a manner as to earn the title of "swindler" or "cheat," without subjecting himself to an indictment for a criminal offense. This question has been considered as settled ever since the decision in Savile v. Jardine, 2 H. Bl. 532. It was there held that words charging the plaintiff with being a swindler were not actionable. EXRE, C. J., said the word was "only equivalent to 'cheat;' it cannot be carried further; and that is not actionable." He added, "a thief" always implies felony, but

CHASE.—S

'cheat' not always." BULLER, J., said "swindler" means no more than "cheat;" "when a man is said to be 'swindled,' it means 'tricked' or 'outwitted.'" That case was followed by the supreme court of Massachusetts in Stevenson v. Hayden, 2 Mass. 406; and see Carter v. Andrews, 16 Pick. 1, 9. In Neal v. Lewis, 2 Bay, 204, the word "swindler" was applied to a merchant; and, besides, the plaintiff was also charged with being a thief. The court had no occasion to say whether the first charge was actionable or not. I am not aware that words charging the plaintiff with being a swindler have ever been held actionable, and, upon principle, I think they are not. They do not necessarily import a criminal offense involving moral turpitude, and punishable by indictment.

Judgment for defendant.

(14 Johns. 233.)

VAN ANKIN v. WESTFALL

(*Supreme Court of New York*. August Term, 1817.)

1. SLANDER—WORDS IMPUTING CRIME IN ANOTHER STATE.

An action may be maintained for words charging a crime, although the transaction referred to took place in a State other than that in which the words were spoken and the action brought, so that there could be no prosecution therefor in the latter State.

2. SAME—MITIGATION.

Evidence of the truth of the charge for making which the action is brought is not admissible in mitigation of damages.

Motion for new trial.

Action for slander, in speaking of plaintiff the words, as alleged in the declaration and proved on the trial, "He is a thief, and has stolen fifty dollars in cash from Jacob De Witt." These words were spoken in the state of New York, but referred to a transaction which took place in the state of Pennsylvania, where Jacob De Witt resided. The defendant offered evidence, in mitigation of damages, that before the time the words were spoken plaintiff was in company with a number of other persons, at the house of De Witt, in Pennsylvania, and that the sum of money had at that time been taken from De Witt, who charged the persons who had been at his house with taking it; that those persons agreed to indemnify De Witt; and that plaintiff, in consequence of such agreement, paid his proportion of the loss which De Witt had sustained; but this testimony was overruled by the judge. Defendant then moved for a nonsuit, on the ground that the words as proved were not actionable, as they did not charge plaintiff with the commission of any crime or misdemeanor for which he was liable to be indicted and punished in the state of New York. The motion was denied. The case was submitted to the court without argument.

PER CURIAM. This is an action of slander, charging the defendant with saying of the plaintiff, "He is a thief, and has stolen fifty dollars in cash from Jacob De Witt." It appeared in proof that Jacob De Witt

resided in the state of Pennsylvania, and that the transaction referred to by the defendant took place in that state. The plaintiff's right to sustain the action was objected to, because no crime was alleged against him for which he could be punished here. This objection was properly overruled. Although the plaintiff might not be amenable to our law, had the charge against him been true, yet, from anything that appears, he might have been demanded as a fugitive from justice, and have been punished, if guilty, in the state of Pennsylvania. But the right of the plaintiff to sustain the action does not depend upon the question whether he was liable to be prosecuted and punished for the crime charged against him; as, when the statute of limitations has run against the criminal prosecution, it is still slander to charge the party with the offense; and the party making the charge would have a right to justify, and show the truth of his allegation, notwithstanding the criminal prosecution might be barred. The evidence offered in mitigation of damages was properly overruled. The testimony was to show the truth of the charge alleged against the plaintiff, and was not admissible, under the general issue, in justification; and it is a well-settled rule that the truth of the charge is not admissible in mitigation of damages. The motion for a new trial must accordingly be denied.

Motion denied.

(2 Moody & R. 119.)

FOWLER V. DOWDNEY.

(Court of Queen's Bench. March 2, 1838.)

SLANDER — WORDS IMPUTING CRIME AFTER PUNISHMENT THEREFOR.

To say that a person is a "returned convict" is actionable *per se*, as imputing an offense punishable by transportation; the obloquy remaining, although the punishment has been suffered.

At *nisi prius*, before DENMAN, C. J.

Action for slander for saying of plaintiff, "He is a returned convict." The declaration averred, as special damage, the loss of a customer to whom the words were spoken, plaintiff being a tradesman; but the proof of the special damage failed.

Crowder & Saunders, for plaintiff.

Erle, for defendant.

The words were not actionable in themselves, inasmuch as they imputed no present liability to punishment; for, conceding that an offense for which transportation was the punishment was imputed, the words imply that the party had already suffered that punishment.

DENMAN, C. J. My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offense for which parties are liable to be transported. That is, I think, the plain meaning of the words, as set out in the declaration. They import, to be sure, that the punishment has been suffered, but still the obloquy remains.

Verdict for plaintiff; damages, 1s.

(2 Wend. 534.)

GORHAM V. IVES.

(Supreme Court of New York. May Term, 1829.)

SLANDER — WORDS IMPUTING CRIME BY INTERROGATION.

An action may be maintained for speaking words imputing crime, although not in direct and positive terms, but by way of interrogation only, if, according to the natural and fair construction of the language used, in connection with the circumstances, the hearers had a right to believe that defendant intended to charge plaintiff with the commission of a criminal offense.

Demurrer to declaration.

Action for slander. The declaration alleged that defendant had become possessed of a promissory note dated August 27, 1825, made by William Erwin and James Erwin, payable to William McMurray or order, for \$51.84, payable four months after date, "with interest from date," (the words quoted being interlined in the note,) which had been indorsed to plaintiff, who had collected the amount. The second count of the declaration alleged that defendant, in a discourse with one Parmelee and others, after showing the note, spoke these words: "The note is in Edward A. Cook's handwriting, and the words at the end of the note, 'with interest from date,' are in a different handwriting. The note has only passed through the hands of Cook, McMurray, and Gorham, and these words must have been put there by one of them. The signers of the note say the words were put there since they signed, and I have shown the note to a number of persons,—Reid and others;" and then, addressing Parmelee, proceeded: "Do not you think it is Gorham's handwriting?" and that, Parmelee having asked defendant to explain himself and what he meant, defendant replied, "Time will show." The third count of the declaration alleged that defendant, in a certain other discourse, after showing the note to sundry persons, spoke these words, "This note has been altered after it was signed;" and, on being asked by one of the by-standers if he knew by whom it had been done, he replied, "I do not, but I have shown it to some persons, and they said that the addition at the end of the note was in Shubael Gorham's handwriting;" and added that "one of the signers would swear that the note that he signed was not written payable with interest, for he refused to sign such an one;" and, on being asked by one of the persons present "if Gorham would commit forgery," defendant, holding out the note, replied, "You can see for yourselves." Defendant demurred to the second and third counts of the declaration.

H. P. Hunt, in support of the demurrer. J. L. Viele, opposed.

SUTHERLAND, J. I am of opinion that both counts are good. The words used by the defendant necessarily imply, when taken in connection with the *colloquium*, that the words "with interest from date" had been forged and added to the note after its signature; and the inquiry by the defendant in the second count of Parmelee, "if he did not think the addition was in Gorham's handwriting," and his declara-

tion in the third count that he had showed it to some persons who said "the addition was in Shubael Gorham's handwriting," leave no reasonable doubt that it was the intention of the defendant to impress upon the minds of the persons whom he addressed the belief that the forgery had been committed by Gorham. The charge need not be couched in direct and positive terms. The imputation of crime may be as effectually made by way of interrogation as by an affirmative allegation. The only inquiry is whether, according to the natural and fair construction of the language used by the defendant, (taken in connection with the preliminary circumstances stated by way of *colloquium*,) the persons in whose presence and hearing the language was used had a right to believe that it was the intention of the defendant to charge the plaintiff with the commission of a criminal offense. Such was obviously the intention of the defendant in this case.

Judgment for plaintiff on demurrer, with leave to defendant to plead on payment of costs.

(1 Johns. Cas. 279.)

VAN RENSSELAER v. DOLE.

(*Supreme Court of New York*. April Term, 1800.)

SLANDER—WORDS IMPUTING CRIME ON FACTS NOT CONSTITUTING THE OFFENSE.

To say that certain persons are "highwaymen, robbers, and murderers," the words being spoken and understood with reference to transactions which were known not to amount to the charge the words import, is not actionable.

Motion for new trial.

Action for slander. The declaration charged defendant with speaking of plaintiff and others the following words: "John Keating is as damned a rascal as ever lived, and all who joined his party and the procession on the 4th day of July [meaning the said John Van Rensselaer and the party and procession in which said John Keating acted as captain on said 4th day of July] are a set of black-hearted highwaymen, robbers, and murderers." In other counts, the words were differently charged, with some additional expressions, but in substance the same. Defendant pleaded the general issue. At the trial the words charged were proved to have been spoken by defendant. On behalf of defendant it was shown that, on the day preceding the speaking of the words, there had been a public procession to a church in the place where the parties resided; that Keating commanded an artillery company, which formed part of the procession, attended with music; that one Bird claimed one of the instruments of music, a bass-viol, and went to the church to demand or take it, but it was refused and retained by force; that upon this an affray ensued, in which Bird received a dangerous wound. There was evidence that the conversation in which these words were spoken was understood by the witnesses to relate to the transac-

tions of the preceding day, and that the terms "highwaymen, robbers, and murderers" were used in reference to the treatment of Bird in withholding the bass-viol, and in wounding him. The judge was of opinion that the words being spoken in relation to the transactions of the preceding day, and so understood, were thereby explained, and on that account not actionable. The jury found a verdict for plaintiff for \$50 damages and 6 cents costs. Defendant moved for a new trial, on the ground that the verdict was contrary to law and the evidence.

Van Vechten, for the motion. *Woodworth*, opposed.

PER CURIAM. We agree in opinion with the judge at the trial. The words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and these were known not to amount to the charge which the words would otherwise import.¹ Let the verdict, therefore, be set aside; and, there being no question upon the evidence, the finding of the jury must be considered as contrary to law, and it is therefore ordered that the costs abide the event of the suit.

Rule granted.

¹ NOTE BY EDITOR OF SECOND EDITION OF JOHN-SON'S CASES. In *Cristie v. Cowell*, Peake, 4, the words proved were, "He is a thief, for he has stolen my beer." It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as a servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same which he had not duly accounted for. Lord KENYON directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for, if they referred to the money not accounted for, that, being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus, if a man says to another, "You are a thief, for you stole my tree," it is not actionable, (*Minors v. Leeford*, Cro. Jac. 114; Bull. N. P. p. 5.) for it shows he had a trespass, and not a felony, in his contemplation. Words may import a charge of felony, yet, if it appear from the subject-matter that the fact charged could not have happened, an action cannot be maintained. *Jackson v. Adams*, 2 Bing. N. C. 402, 2 Scott, 599; *Snag v. Gee*, 4 Coke, 16a; *Steph. N. P.* 2252, 2253. "Words apparently actionable may be explained by circumstances to have been intended and understood in an innocent sense. Thus, though the defendant should say, 'Thou art a murderer,' the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, 'Thou art a murderer;' meaning a murderer of hares so killed. *Lord Cromwell's Case*, 4 Coke, 13. But the words, 'I think the business ought to have the most rigid inquiry, for he murdered his first wife,—that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death,'—were held to be actionable, as importing, at least, a charge of manslaughter; and, though the words were doubtful, the doubt would be cured by the finding of a jury that they were meant in that sense. *Ford v. Primrose*, 5 Dowd. & R. 283." 1 Starkie, *Sland. & L.* (Wend. Ed.) 99 et seq.

(See, also, *Pollard v. Lyon*, 91 U. S. 225; *Thomas v. Blasdale*, 147 Mass. 433, 18 N. E. Rep. 214; *Geary v. Bennett*, 53 Wis. 444, 10 N. W. Rep. 602; *Pollock v. Hastings*, 88 Ind. 248; *Anon.*, 60 N. Y. 262; *Klumph v. Dunn*, 66 Pa. St. 141; *Hayes v. Ball*, 72 N. Y. 418; *Simmons v. Mitchell*, L. R. 6 App. Cas. 156.)

2. Charge of certain contagious diseases.

(7 Gray, 181.)

GOLDERMAN v. STEARNS *et ux.*

(*Supreme Judicial Court of Massachusetts.*
Oct. Term, 1856.)

1. SLANDER — WORDS IMPUTING CONTAGIOUS DISEASE.

To say of a man that he has the venereal disease is actionable, as tending to exclude him from society; but if, when the charge was made, he had such disease, the truth of the charge is a justification.

2. SAME.

Defendant asserted that plaintiff had the venereal disease, and, having married, communicated it to his wife, and that he was "the guilty one." *Held*, that no action could be maintained therefor if plaintiff in fact had such disease; and that evidence that it was communicated to him by his wife, whom he had married not knowing that she had the disease, was immaterial.

3. SAME—IMPLIED CHARGE OF CRIME.

Such words are not actionable as imputing to plaintiff a punishable offense; they do not necessarily import the commission of adultery or fornication.

On exceptions.

Action by Caspar Golderman against Charles Stearns and wife for slander. The declaration alleged that the female defendant accused plaintiff of "having had a loathsome venereal disease, and with that disease upon him having contracted marriage, and given the disease to his wife, by words spoken of the plaintiff, who was then and there lately married to his wife, substantially as follows: 'Golderman has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one. He has given it to his wife.'" At the trial plaintiff introduced evidence tending to prove the words and *colloquium* set forth, and rested his case. Defendants then introduced evidence that, immediately after his marriage, plaintiff had such disease, and claimed that this made out a justification. Plaintiff then offered to prove that, being a widower, and the father of adult children, he married a woman who had the disease, of which fact he was then ignorant, and, immediately after the marriage, took the disease from his wife, and thereupon sent her away from his house, and had not lived with hersince. The judge ruled that if the jury were satisfied that plaintiff, at the time of the speaking of the words set forth in the declaration, had

the disease in fact, it would be a sufficient justification, and the evidence offered by plaintiff was immaterial. A verdict was taken for defendants. Plaintiff alleged exceptions.

B. F. Butler, for plaintiff. *J. G. Abbott* and *G. A. Somerby*, for defendants.

METCALF, J. The charge against the plaintiff of his having the venereal disease is held to be actionable for the same reason that a charge of his having the leprosy or the plague would be; not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease. Hence it is that to charge one with having had the disease is not actionable; such charge not tending to exclude him from society as a person with whom it is unsafe to associate. *March, Sland.* (Ed. 1674.) 77, 78; *Crittall v. Horner*, Hob. 219; *Bloodworth v. Gray*, 8 Scott, N. R. 11; *Carslake v. Mapledoram*, 2 Term R. 473; 3 Bl. Comm. 123, note by Christian; 2 Dane, Abr. 568.

The jury having found that the plaintiff, when the charge against him was made, had the venereal disease, there remains no ground on which this action can be maintained; for the truth of the charge is a justification. Doubtless such a charge as the plaintiff complains of may be accompanied with words that necessarily impute adultery or fornication, either of which is an offense punishable by the laws of this commonwealth. In such a case the charge would be actionable. But, in the present case, the words which were added to the charge of the plaintiff's having the disease did not impute any punishable offense. They only asserted that the plaintiff, while a widower, was diseased, and, after his marriage to his present wife, communicated the disease to her. The allegation that he was "the guilty one" means that the disease was communicated by him to her, and not by her to him. It does not import that he contracted the disease guiltily; that is, by committing adultery or fornication. Nor does the plaintiff's declaration aver that any punishable offense is imputed to him by the words spoken.

Judgment on the verdict.

(See, also, *Williams v. Holdredge*, 22 Barb. 396; *Hewit v. Mason*, 24 How. Pr. 366; *Kaucher v. Blinn*, 29 Ohio St. 62.)

3. Charge affecting a man in his office, profession, trade, employment, etc.

(7 Wend. 204.)

FORWARD v. ADAMS.

(*Supreme Court of New York.* May, 1831.)

1. SLANDER—WORDS AFFECTING PLAINTIFF IN HIS OFFICE OR VOCATION.

Words which are not actionable in themselves, but could be so only in consequence of the special character of the person of whom they are spoken, are not actionable when spoken after such per-

son has ceased to sustain that special character; the ground of action is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office, in consequence of the slanderous words, not that his general reputation is affected by them.

2. SAME — CHARGE AFFECTING PUBLIC OFFICER AFTER TERMINATION OF HIS OFFICE.

To say, of a person formerly appointed to negotiate a treaty with Indians, that he bribed

them to sign the treaty, not being actionable except as affecting him in such office, is not actionable where the office had expired before the words were spoken.

Demurrer to declaration.

Action for slander. The declaration set forth by way of inducement that, on May 23, 1826, plaintiff was appointed by the president of the United States a commissioner on the part and behalf of the United States, as the general protector of Indian tribes, to attend a treaty to be held between the proprietors of the pre-emption right to certain lands held by Indians in the state of New York, and those Indians, under the sanction of the government of the United States, for the extinguishment of the right of the Indians to the occupancy of such lands, with instructions to exercise a sound discretion in the business, and, if satisfied of the fairness of the propositions of the proprietors, to afford them such co-operation in effecting the object of the treaty as he might judge proper; and that, having accepted the appointment, plaintiff, on August 31, 1826, attended a treaty at Buffalo, and, being satisfied of the fairness of the propositions of the proprietors, he sanctioned, approved, and recommended a treaty there made between the Indians and proprietors for the extinguishment of the right of the Indians to the occupancy of the lands, the subject of the treaty; and it charged that defendant, in a discourse had on June 1, 1828, of and concerning the plaintiff, and of and concerning his conduct as such commissioner, and in relation to the treaty which had been concluded, uttered the following words, alleged to be false, scandalous, and defamatory, viz.: "He bribed some of the Indians to sign the treaty. He hired some of the Indians to sign the treaty. He was guilty of hiring or bribing some of the Indians to sign the treaty. He was dishonest with the Indians." Innuendo, that plaintiff had misdeemeaned himself in his appointment, had perverted his office, and corruptly exercised his influence with the Indians by means of bribery and corruption. Defendant demurred to the declaration.

S. A. Foot, for the demurrer. J. L. Wendell, opposed.

SUTHERLAND, J. The demurrer is well taken. It is conceded that the words do not impute an indictable offense. If true, the plaintiff would not be subjected by them to a criminal prosecution. The offense, if any, was an offense against the United States, and it is not shown that they have any statute applicable to the case; and the better opinion seems to be that the court of the United States have no general common-law criminal jurisdiction. U. S. v. Hudson, 7 Cranch, 32; U. S. v. Worrall, 2 Dall. 384; opinion of Chief Justice MARSHALL in Burr's Trial; U. S. v. Coolidge, 1 Gall. 488, 1 Wheat. 415; Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, by Mr. Du Ponceau; 1 Kent, Comm. 311, 320; Serg. Const. Law, 262, 265.

The action is put distinctly on the ground that the words were spoken of the plaintiff as a public officer, and tended to his in-

jury and disparagement in that character. The fatal objection to the action on this ground is that it appears on the face of the declaration that the plaintiff was not in office when the words were spoken, but that the office itself, being a special trust, and temporary in its nature, had expired about two years before the uttering of the slanderous words. In *Walden v. Mitchell*, 2 Vent. 265, the following *dictum* is imputed to the chief justice: "That where a man had been in an office of trust, to say that he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again, and therefore was actionable." The observation was not called for by the case, as the action was sustained on an entirely different ground. Also in *Pridham v. Tucker*, Yel. 153, it appears to have been held that an action could be maintained for the words, "When thou wert a justice thou wert a bribing justice," for the same reason assigned in *Ventris*. Chief Justice DE GREY, in delivering the opinion of the court in *Onslow v. Horne*, 3 Wils. 188, said: "I know of no case where an action for words was ever grounded upon eventual damages which may possibly happen to a man in a future situation, notwithstanding what the chief justice throws out in 2 Vent. 266. I think the chief justice went too far." The authority of Chief Justice DE GREY effectually disposes of these cases. But he is also supported by many analogous decisions. Thus, where an action is brought for words (not actionable in themselves) spoken of a person in a particular calling or profession or employment, it must appear that he followed such profession or employment when the words were spoken. In *Gibs v. Price*, Style, 231, the judgment was arrested because it was not averred that the plaintiff was a barrister at the time of the bringing of his action, the words having been spoken of him in his professional character. And in *Cary's Case*, Poph. 207, the words were spoken of the plaintiff as a counselor at law; and it was said by JONES, J., that it was not sufficient for the plaintiff to aver that he was *eruditus in lege*, but he ought to say that he was *homo conciliarius*. He must show that he sustained the special character in relation to which the words were uttered. In *King v. Lake*, 2 Vent. 28, (which was also a case of words spoken of the plaintiff as a lawyer,) it was expressly stated that the plaintiff was bred up to the law, and practiced it, and had many persons for his clients, and thereby got money and maintained his family. *Kerle v. Osgood*, 1 Vent. 50. Upon the strength of these and other cases, it is laid down in treatises upon this subject that, where an action is brought for words spoken of a barrister or physician, it must appear that he practiced as such at the time the words were spoken; for otherwise the words could not have affected him professionally. *Starkie, Sland. & L.* 105; *Bac. Abr. tit. "Slander,"* 212-215. So, if an action be brought for publishing words of a tradesman, concerning his trade, it must be averred that at the time of publishing them he was in trade; for, if he were not

at that time in trade, his credit could not be hurt by the words. *Collins v. Malin*, Cro. Car. 382; *Jordan v. Lyster*, Cro. Eliz. 273; *Tuthill v. Milton*, Cro. Jac. 222. These cases all admit this principle, for, although the court in some of them refused to arrest the judgment, it was upon the ground that, after verdict, they would intend, from the general averment, (that the plaintiff had, for a long time preceding the day on which the words were laid, exercised the trade,) that he continued to exercise it on the day the words were published.

The ground of action in these cases is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office in consequence of the slanderous words, not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken, in this class of cases, are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they are spoken. The fact of his sustaining that special character, therefore, lies at the very foundation of the action. On this ground, therefore, the declaration is bad.

It may be questionable, also, whether the words necessarily convey a charge of official misconduct. The terms "bribing" and "hiring" the Indians to sign the treaty are evidently synonymous, and were intended to convey the same idea; and, if the treaty which they were by these means induced to sign was a fair and advantageous one for them, it may not have been a violation of the official duty of the plaintiff (when the peculiar character of the Indians is considered) to have resorted to presents or pecuniary inducements to procure their assent to it. It is unnecessary, however, to express any opinion upon this point.

Judgment for defendant.

(1 Sandf. 155.)

IRELAND v. MCGARVISH.

(*Superior Court of New York City, General Term.* Dec. 1847.)

SLANDER — WORDS AFFECTING PLAINTIFF IN HIS BUSINESS.

To say of the keeper of a house of public entertainment, "He is a dangerous man;" "He is a desperate man;" "I am afraid to go in his house alone;" "I am afraid of my life,"—is not actionable, as affecting his business, since the words do not relate to his business character, or charge any delinquency in his business.

Motion to set aside nonsuit and for a new trial.

Action of slander. The declaration alleged that plaintiff was the proprietor of a certain garden and house of refreshment and entertainment, by keeping which he obtained large gains and profits; and that defendant spoke and uttered to one Taggart and to others the following defamatory words of and concerning the plaintiff, and of and concerning his trade and business: "I [the said defendant meaning] am afraid to go to his [the said plaintiff's meaning] house alone,

[referring to the said plaintiff, and thereby and then and there meaning that the said plaintiff was a dangerous man, whom the said defendant had good cause to be afraid of, and that the said defendant, for the preservation of his life, had to have some one to protect him.]" "I [the said defendant meaning] am afraid of my life, [thereby and then and there meaning that the said plaintiff was seeking his, the said defendant's, life.]" "He [the said plaintiff meaning] is a dangerous man, [thereby and then and there meaning that the said plaintiff was a dangerous and disreputable man, whom he, the said Taggart, and others should shun as unworthy of his esteem, and that the said plaintiff was a man whom it would be dangerous to trust.]" "He [the said plaintiff meaning] is a desperate man, [thereby and then meaning as last aforesaid.]" "Look out, for it is more than likely he [the said plaintiff meaning] will take advantage of you, [thereby and then and there meaning that the said plaintiff was a dishonest and disreputable person, who would take advantage of those who should confide in him, or repose confidence in him, the said plaintiff, and that the said plaintiff was one who should be treated and looked upon as a disreputable man, likely, if an opportunity presented, to cheat and defraud.]" "He [the said plaintiff meaning] is a thief, [thereby and then and there meaning that the said plaintiff had been guilty of a crime of stealing, which rendered him amenable to the laws of the state, as and for a felony.]" At the trial, in October, 1846, a witness for plaintiff, one Robert Sears, testified that plaintiff for six years past owned and kept the Washington House and gardens at Hoboken; that in the summer of 1845, about the month of June, defendant called at a public house in Elm street, in the city of New York, where witness was employed as a bar-keeper, and commenced a conversation about plaintiff. He said he had left plaintiff's employment. He said: "He is a dangerous man." "He is a desperate man." "I am afraid to go to his house alone." "I am afraid of my life." Witness stated that, previous to this, he was in the habit of going to plaintiff's house at Hoboken, with his friends, for refreshments and entertainment, and had been in such habit for about four years. After this conversation with defendant the witness did not go to plaintiff's for some time, and made up his mind that he would not go again until he had seen plaintiff; and it was not until he had called on the witness, and satisfied him of the falsity of the assertions made by defendant, that the witness renewed his visits. Upon this testimony plaintiff rested. A motion was made for a nonsuit, which was granted. Plaintiff moved to set aside the nonsuit.

P. B. Sweeney and *J. T. Brady*, for the motion. *T. W. Clerke*, opposed.

VANDERPOEL, J. It cannot be pretended that the words proved to have been spoken by the defendant are actionable *per se*; but it is contended that they convey an imputation affecting the business of the plaintiff, and are therefore actiona-

ble. It is a well-established rule that words are actionable which directly tend to the prejudice of any one, in his office, trade, business, or means of getting a livelihood. *Onslow v. Horne*, 3 Wils. 186; *Starkie, Sland. & L.* 180. The words, to be actionable, because they injure one in his business, must have a direct tendency to produce this effect. They must relate to his business character. In *Doyley v. Roberts*, 3 Bing. N.C. 835, it was said of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster." The jury found that the words tended to injure the plaintiff morally and professionally, but they also found they were not spoken of him in his business of an attorney, and for that reason the court ordered a nonsuit. *TINDAL, C. J.*, said the words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. So here, though the words were spoken of a man who happened to keep a public garden and house of entertainment, they did not touch or affect him more than they would have touched or affected a person in any other business or profession. In *Southam v. Allen*, 3 Salk. 326, *T. Raym.* 231, the plaintiff declared that he was a keeper of a livery stable, and of the Bell Savage Inn, and that the defendant had other stables there, and that *W. R.*, coming thither with a wagon, inquired of the defendant which was the Bell Savage Inn, who replied, "This is Bell Savage Inn; deal not with Southam, [the plaintiff,] for he is broke, and there is neither entertainment for man or horse." After verdict for the plaintiff, the judgment was affirmed. This was a charge that came directly home to the business of the plaintiff. But to say of a man, "I am afraid to go to his house alone;" "He is a desperate man;" "He is a dangerous man;" "I am afraid of my life,"—is no more calculated directly to affect his business as keeper of a house of entertainment than to prejudice his business as a merchant, a baker, or a blacksmith. All general imputations upon the morality or integrity of men, if believed by those who hear them, may possibly prejudice the business interests of those of whom they are spoken; but the law has not yet been so prolific of slander suits as to say that such general ebullitions, charging no crime, and pointing to no profession or means of livelihood, shall form the legitimate foundation of an action for defamation. Words, to be actionable, as affecting the plaintiff's business, must charge some delinquency in connection with such business. In the late case of *Van Tassel v. Capron*, 1 Denio, 250, it was expressly held that, where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character. As the words here are not actionable in themselves, and do not relate to the business of the plaintiff, the nonsuit was properly granted.

(18 Barb. 425.)

SECOR v. HARRIS.

(Supreme Court of New York, General Term. Sept. 12, 1854.)

1. SLANDER—WORDS IMPUTING WANT OF PROFESSIONAL SKILL.

To charge a physician with gross ignorance and unskillfulness in his profession, though in but a single act, is actionable *per se*. In such a case the law presumes damage from the very nature of the charge.

2. SAME.

To say of a physician, in regard to his treatment of children not over three years of age, "He killed my children. He gave them tea-spoonful doses of calomel, and it killed them. They died the same day,"—is actionable.

SHANKLAND, J., dissenting.

Motion for new trial.

Argued before CRIPPEN, SHANKLAND, and MASON, JJ.

F. U. Fenno, for the motion. *W. B. Hawes*, opposed.

MASON, J. This is an action for slander. Upon trial of the cause, the plaintiff proved the following words, which were also alleged in the complaint: "Dr. Secor killed my children." "He gave them tea-spoonful doses of calomel, and they died. Dr. Secor gave them teaspoonful doses of calomel, and it killed them. They did not live long after they took it. They died right off, the same day." The plaintiff was proved to be a practicing physician, and the evidence shows that he had practiced in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and took them from the consideration of the jury. These words spoken of the plaintiff as a physician are actionable *per se*, whatever may be said upon the question whether they impute a criminal offense. They do not impute a criminal offense, unless there is evidence, arising from the quantity of calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of tender years full tea-spoon-doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question whether the defendant did not intend to impute to the plaintiff, by these words, a criminal offense. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting

aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them tea-spoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. *Starkie, Sland. & L.* 100, 110, 115, 120, 122; *Martyn v. Burlings*, Cro. Eliz. 589; *Bac. Abr. tit. "Slander," B; Watson v. Vanderlash*, Het. 69; *Tutty v. Alewin*, 11 Mod. 221; *Smith v. Taylor*, 1 Bos. & P. (N.R.) 196; *Sumner v. Utley*, 7 Conn. 257. I am aware that it was held in the case of *Poe v. Mondford*, Cro. Eliz. 620, that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in *Foot v. Brown*, 8 Johns. 54, that it was not actionable to say of an attorney or counselor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of *Poe v. Mondford* is repudiated in *Bacon's Abridgment* as authority, and cases are referred to as holding a contrary doctrine. Volume 9, pp. 49, 50. The cases of *Poe v. Mondford* and of *Foot v. Brown* were reviewed by the supreme court of Connecticut in the case of *Sumner v. Utley*, 7 Conn. 257, with most distinguished ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held that words are actionable in themselves which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskillfulness. To the same effect is the case of *Johnson v. Robertson*, 8 Port. (Ala.) 486, where it was held that the following words, spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutty v. Alewin*, 11 Mod. 221, where it was held to be actionable to say of an apothecary that "he killed a patient with physic." See, also, *Onslow v. Horne*, 3 Wils. 186; *Bac. Abr. tit. "Slander," B 2*, vol. 9, p. 49, (*Bouv. Ed.*) The cases of *Poe v. Mondford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American states, while the case of *Poe v. Mondford* seems to have been repudiated in England; and I agree with *CLINCH, J.*, that the reason upon which the case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his

disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskillfulness; and, where charges are made against a physician that fall within this class of cases, they are not actionable without proof of special damages. 7 Conn. 257. It is equally true that a single act of a physician may evince gross ignorance, and such a total want of skill as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable *per se*. *Id.* The rule may be laid down as a general one that, when the charge implies gross ignorance and unskillfulness in his profession, the words are actionable *per se*. This is upon the ground that the law presumes damage to result from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. *Starkie, Sland. & L.* 581. It was well said by the learned Chief Justice *HOSMER* in *Sumner v. Utley*, 7 Conn. 257, that, "as a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then the mistaking an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice *HOSMER* in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence, and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies, and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof, (*Starkie, Sland. & L.* 581;) in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the wit-

ness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practice." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the

consideration of the jury, and a new trial must be granted, costs to abide the event of the action.

New trial granted.

CRIPPEN, J., concurred.

SHANKLAND, J., dissented.

(See, also, *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457; *Gauvreau v. Superior Pub. Co.*, 62 Wis. 403, 22 N. W. Rep. 726; *De Pew v. Robinson*, 95 Ind. 109; *Fitzgerald v. Redfield*, 51 Barb. 484; *Lumby v. Allday*, 1 Crompt. & J. 301.)

B. SLANDER WITH SPECIAL DAMAGE.

(17 N. Y. 54.)

TERWILLIGER v. WANDS.

(*Court of Appeals of New York*. March, 1858.)

1. SLANDER — SPECIAL DAMAGE — REPETITION BY OTHER PERSONS.

Damages caused by the repetition of defamatory words by the person to whom they were spoken, without proper occasion for repeating them, are not the natural and legal consequence of the first speaking of them, and the person so repeating them is alone liable for such damages.

2. SAME.

Illness and inability to labor, caused by the effect on one's mind of defamatory words reported to him to have been spoken of him, are not special damages for which he can maintain an action of slander. Only injuries affecting the reputation are the subject of the action. The words must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result.

ROOSEVELT, J., dissenting.

Appeal from supreme court, general term, fifth district.

Action for slander. The complaint alleged the speaking by defendant of words charging plaintiff with lewd and unchaste conduct, and also alleged special damage therefrom. At the trial, several witnesses for plaintiff, among them La Fayette Wands and John S. Neiper, testified to the speaking of such words by defendant, charging plaintiff with continued unlawful intercourse with a Mrs. Fuller at her house. The only evidence that what defendant said was communicated to plaintiff was that given by the witness Neiper, who, having testified to the speaking of such words by defendant to him in the beginning of May, 1852, further testified that he had married the sister of Mrs. Fuller, and that he was an intimate friend of plaintiff; that in May, 1852, he communicated to plaintiff what defendant had said to him, and in June of the same year, while hoeing corn with plaintiff, talked over what La Fayette Wands had said defendant had told him; that the story of what La Fayette Wands had said defendant told him was all over the country; that the witness told plaintiff what the report was, that he went to Mrs. Fuller's for the purpose of having connection with her; that plaintiff felt bad, threw down his hoe, and left the field, that plaintiff had always worked with the witness before that, and he had been in middling good health; that plaintiff after that appeared melancholy, and looked bad, pale, and sick; his appetite was

poor, and he had to hire more help. Nancy Harpburn, a daughter of the plaintiff, testified that she heard the report that La Fayette Wands had circulated the 1st of May, 1852; that she remembered, when Neiper hoed corn there, of plaintiff's getting worse, going into the house, and to bed; that she remarked a great difference in his appearance, not resting at night; did not discover any other difference; he did not pursue his work as formerly; this debility commenced in June; heard of Wand's report in May or June; first heard of its coming through La Fayette Wands, in June, about the middle of hoeing time, and then remarked a difference in his appearance; he grew worse all through the summer. On cross-examination she testified that she heard some slight reports through the winter that he was very intimate, and more than was proper, with Mrs. Fuller, and had frequent conversations with her father about it; that she knew that Mr. Fuller made such charges during the winter and summer, and that she talked with her father about what Fuller had said; that a lady told her in May it was reported Fuller had caught her father there, and she told her father in June; that Dr. Price prescribed for the plaintiff in June and July. Dr. Price testified that he called to see plaintiff as a patient in May or June, 1852; that plaintiff was debilitated with what appeared to be mental difficulty; that he judged, from what plaintiff's friends said, that plaintiff's health was impaired so that he could not labor on his farm; that plaintiff was out of health through the summer. George Terwilliger, a son of plaintiff, testified that he saw plaintiff frequently along in May and June, 1852; that his health in the winter was good, and began to decline about the 1st of May, and became worse after that, and during the summer he was entirely prostrated; that he became worse, and unable to attend to his business, and neglected it; his crops were neglected and fences down; his corn suffered for want of hoeing; that the plaintiff appeared like a person worn down by sickness in May, June, and July; he was a farmer, and his business required his personal attention every day.

Plaintiff having rested, defendant moved for a nonsuit on the grounds: (1) That the words were not spoken by defendant to the plaintiff, nor authorized by him to be communicated to plaintiff; (2) that there was no evidence that the damages,

if any, proved, were occasioned by the speaking of the words by the defendant. The court granted the motion, and judgment was entered against plaintiff, and was affirmed on appeal to the general term. Plaintiff appealed from the judgment of affirmance by the general term.

B. D. Noxon, for appellant. *Leroy Morgan*, for respondent.

STRONG, J. The words spoken by the defendant not being actionable of themselves, it was necessary, in order to maintain the action, to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate, and legal consequence of the words. *Starkie, Sland. & L. (Wend. 2d Ed.) 203*; *2 Starkie, Sland. & L. 62, 64*; *Beach v. Ranney, 2 Hill, 309*; *Crain v. Petrie, 6 Hill, 523*; *Kendall v. Stone, 5 N. Y. 14*. Where words are spoken to one person, and he repeats them to another, in consequence of which the party to whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages. *Ward v. Weeks, 7 Bing. 211*; *Hastings v. Palmer, 20 Wend. 225*; *Keenholts v. Becker, 3 Denio, 346*; *Stevens v. Hartwell, 11 Metc. (Mass.) 542*. These views dispose of this case as to the right of action in respect to all the words but those spoken to the witness Neiper, as none of them were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant; and there is no proof as to the circumstances under which they were repeated by those witnesses. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate, and legal effect of the original speaking of the words by the defendant.

In regard to the words spoken by the defendant to Neiper, it is proved that they were communicated by the latter to the plaintiff, and that Neiper was at the time an intimate friend of the plaintiff. This friendly relation, it is claimed on the part of the plaintiff, rendered the communication of Neiper to him proper; and, being so, it is insisted that the defendant is responsible for the consequences, in the same manner as if the words had been spoken directly to the plaintiff. There are several cases in which it is suggested that circumstances may exist which will justify the repetition of slanderous words, and that when repeated under such circumstances, and damages ensue, the first speaker may be liable in like manner as he would be if the injury had arisen from the words without the repetition. *Ward v.*

Weeks, 7 Bing. 211; *Keenholts v. Becker, 3 Denio, 346*; *Olmsted v. Brown, 12 Barb. 657*; *McPherson v. Daniels, 10 Barn. & C. 263*. Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion, and damages result, the first speaker should be held responsible for the damages, as flowing directly and naturally from his own wrong. It is not necessary in the present case to decide whether the proposition is law; for, assuming it to be so, and that illness and inability to labor constitute such special damages as will support an action, the evidence in this case wholly fails to show that the damages were a consequence of the words spoken by the defendant to Neiper. The proof is that they were mainly the result of the repetition of the words spoken to the witness Wands, and reports of other persons. It was not until a considerable time after the plaintiff was informed by Neiper what the defendant had said to the latter that he began to be ill, and his illness commenced immediately after the communication to him of what had been said by La Fayette Wands. At that time the plaintiff had been informed of charges made by Fuller to the same effect, and it is a fair conclusion upon the proof that he then knew what the witness Wands says was a fact, that "the story was all over the country." Under these circumstances, it is impossible to conclude that what the defendant stated to Neiper produced the damages. *1 Starkie, Sland. & L. 205*; *Vicars v. Wilcocks, 8 East, 1*; *Crain v. Petrie, 6 Hill, 522*.

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous, and slanderous words, tending to his damage and derogation." *3 Bl. Comm. 123*; *Starkie, Sland. & L. Prelim. Obs. 22-29*; *1 Starkie, Sland. & L. 17, 18*. It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." *3 Bl. Comm. 124*. As to what constitutes special damages, *Starkie* mentions the loss of a marriage; loss of hospitable gratuitous entertainment; preventing a servant or bailiff from getting a place; the loss of customers by a tradesman; and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. *1 Starkie, Sland & L. 195, 202*; *Cooke, Defam. 22-24*. In *Olmsted v. Miller, 1 Wend. 506*, it was held

that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle, and charged not to return until she had cleared up her character. So, in *Beach v. Ranney*, supra, was the circumstance that persons who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. 2 Starkie, Ev. 872, 873. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by or through impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings, and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result. In this view of the law, words which do not degrade the character do not injure it, and cannot occasion loss. In *Cooke's Law of Defamation*, (page 24,) it is said: "In order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for, if they be innocent, the consequence does not follow naturally from the cause." In *Kelly v. Partington*, 5 Barn. & Adol. 645, which was an action for slander, the words in the declaration were, "She secreted 1s. 6d. under the till, stating these are not times to be robbed." It was alleged as special damage that by reason of the speaking of the words a third person refused to take the plaintiff into service. The plaintiff recovered one shilling damages, and the defendant obtained a rule *nisi* for arresting the judgment, on the ground that the words, taken in their grammatical sense, were not disparaging to the plaintiff, and therefore that no special damage could result from them. *DENMAN, C. J.*, said: "The words do not of necessity import anything injurious to the plaintiff's character, and we think the judgment must be arrested, unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning can be supplied by innuendo; but that is not the case

here. The rule for arresting the judgment must therefore be made absolute." *LITTLEDALE, J.*, said: "I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In *Comyns' Digest*, tit. 'Action on the Case for Defamation,' (D 730,) it is said generally that any words are actionable by which the party has a special damage, but all the examples given in illustration of the rule are of words defamatory in themselves, but not actionable, because they do not subject the party to a temporal punishment. In all the instances put, the words are injurious to the reputation of the person of whom they were spoken." *TAUNTON, J.*, said: "The expression ascribed to the defendant, 'these are not times to be robbed,' seems to be saying the times are so bad I must hide my money. If *Stenning* refused to take the plaintiff into his service on this account, he acted without reasonable cause; and, in order to make words actionable, they must be such that special damage may be the fair and natural result of them." *PATTESON, J.*, said: "I have always understood that the special damage must be the natural result of the thing done, etc. It is said that the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory. *Vicars v. Wilcocks*, 8 East, 1." It necessarily follows from the rule that the words must be disparaging to character; that the special damage to give an action must flow from disparaging it. In the case last cited the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute, but the words were not calculated to produce such a result, and therefore the action would not lie.

In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander; but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may, and sometimes does, follow from such a cause, but not ordinarily; and the rule of law was framed in reference to common and usual effects, and not those which are accidental and occasional.

It is true that this element of the action for slander, in the case of words not actionable of themselves,—that the special

damages must flow from impaired reputation,—has been overlooked in several modern cases, and loss of health, and consequent incapacity to attend to business, held sufficient special damage, (*Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333;) but these cases are a departure from principle, and should not be followed. If such consequences were sufficient, it would not be necessary to allege in the complaint or prove that the words were spoken in the presence of a third person. If spoken directly to the plaintiff, in the presence of no one else, he might himself, under the recent law allowing parties to be witnesses, prove the words and the damages, and be permitted to recover. It has been regarded as necessary to an action that the words should be published by speaking them in the presence of some person other than the plaintiff, both in the case of words actionable and those not actionable. 1 *Starkie, Sland. & L.* 360; 2 *Starkie, Sland. & L.* 12; *Cooke, Defam.* 87.

Where there is no proof that the character has suffered from the words, if sickness results, it must be attributed to apprehension of loss of character; and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss,—one which

has actually taken place. It is not necessary to decide whether the doctrine which has some support in the books, that a husband may maintain an action for the slander of his wife, producing sickness which prevents her attending to her ordinary business, if it conflicts with the principle now advanced, may be maintained upon some ground of exception to the general rule. It is doubtless true that in such cases the law regards more the loss of the wife's services, which alone entitles the husband to sue, than the influence of the words upon her character, and the husband has no control over the effect of the words; whereas, in other cases, the injury to character, as shown by the special damages, is principally regarded, and unusual, extraordinary consequences may be assumed to be in some measure under the control of the party complaining. Still the objection that special damages of that nature are not a fair, ordinary, natural result of such a wrong remains, and this objection appears to be alike applicable, and entitled to the same force, whether the action be brought by the husband or the party slandered. *Olmsted v. Brown*, 12 Barb. 657; *Keenholts v. Becker*, 3 Denio, 346.

ROOSEVELT, J., dissented. All the other judges concurring.

Judgment affirmed.

(See, also, *Pollard v. Lyon*, 91 U. S. 225; *Bassell v. Elmore*, 48 N. Y. 561; *Lynch v. Knight*, 9 H. L. Cas. 577; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Shafer v. Ahalt*, 48 Md. 171.)

II. LIBEL.

(68 Me. 295.)

TILLSON v. ROBBINS.

(*Supreme Judicial Court of Maine.* June 7, 1878.)

LIBEL—WORDS EXPOSING TO PUBLIC HATRED AND CONTEMPT.

For the publication, by writing or printing, of a charge such as, if believed, would naturally tend to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, an action may be maintained by him, without allegations of special damage, or of any fact to make such publication import a charge of crime.

On exceptions.

Action by *Davis Tillson* against *Levi M. Robbins* for libel. The declaration alleged, in the first count, the publication by defendant in a certain newspaper, of and concerning plaintiff, of the following words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation, and fraud in the Hurricane Island vote, for which *Davis Tillson* is without doubt responsible, as he was last year;" and in the second count the publication by defendant of a libel of and concerning plaintiff in his business of merchant and contractor, in the same words, with the addition of the following: "Hurricane Island is all owned by *Davis Tillson*, an intense partisan and an unscrupulous politician. It is leased to government, and contains quarries from which

is taken granite for public buildings. This granite is bought by government of *Tillson*, and is there cut by men who receive about \$3.50 per day. On all expenditures *Tillson* has a gratuity of 15 per cent., for which he renders no equivalent, unless the lease of the island and its facilities be deemed such." Each count contained innuendoes, explaining these words as meaning that plaintiff had been guilty of the crime of corruption, intimidation, and fraud at an election held on the island mentioned; but there was no averment of the fact of such election, nor any colloquium that the words were used in reference thereto. Defendant demurred to the declaration. The demurrer was overruled, and defendant alleged exceptions.

D. N. Mortland and *O. P. Hicks*, for plaintiff. *A. P. Gould* and *J. E. Moore*, for defendant.

BARROWS, J. The defendant's criticisms upon the writ to which he has demurred would be pertinent if the case were one of mere verbal slander. But in respect to the supposed requirement that, in order to maintain an action for damages where no crime is imputed, special damage must be alleged and proved, a distinction has been long and uniformly maintained between mere words and written or printed slander. *Holt, Libel*, (1st Amer. Ed.) 218-223. Much which, if only spoken, might be passed as idle blackguardism, doing no

discredit save to him who utters it, when invested with the dignity and malignity of print is capable, by reason of its permanent character and wide dissemination, of inflicting serious injury.

The cases, ancient and modern, where this distinction has been regarded, are numerous. A reference to a few of them will serve all the purposes of a more elaborate discussion. Lord HOLT says: "Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." *Cropp v. Tilney*, 3 Salk. 226.

To say of a man, "He is a dishonest man," is not actionable without special damage alleged and proved; but to publish so, or to put it upon posts, is actionable. *Austin v. Culpeper*, Skin. 124.

In *Villers v. Monsley*, 2 Wils. 403, the court say: "There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable either way. For speaking the words 'rogue' and 'rascal' of any one an action will not lie, but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, no doubt but the action well lies."

In another case, where the defendant had applied the epithet "villain" to the plaintiff in a letter to a third person, and the plaintiff, though alleging, failed to prove, any special damage, the court ordered judgment for the plaintiff, expressing the opinion that "any words written and published, throwing contumely on the party, are actionable." *Bell v. Stone*, 1 Bos. & P. 331.

In one of Christian's notes to Blackstone mention is made of a case where a young lady recovered £4,000 damages for reflections upon her chastity, published in a newspaper, though she could not, under English laws, without alleging special damages, such as loss of marriage or the like, have maintained an action for verbal slander containing the grossest aspersions upon her honor.

In *J'Anson v. Stuart*, 1 Term R. 748, it was held that to print of any person that he is a swindler is a libel and actionable; for it is not necessary, in order to maintain an action for libel, that the imputation should be one which, if spoken, would be actionable as slander.

In *Thorley v. Kerry*, 4 Taunt. 355, the words of the alleged libel, as declared on, were: "I pity the man [meaning the plaintiff] who can so far forget what is due to himself and others as, under the cloak of religion, to deal out envy, hatred, malice, uncharitableness, and falsehood." *MANSFIELD*, chief justice of the common pleas, pronouncing judgment for the plaintiff in the exchequer chamber at Easter term, 1812, while he declared himself personally disposed to repudiate the distinction between written and unwritten scandal, says: "I do not now recapitulate the cases, but we cannot, in op-

position to them, venture to lay down at this day that no action can be maintained for any words written for which an action could not be maintained if spoken." For later English cases maintaining the same doctrine, see *McGregor v. Thwaites*, 3 Barn. & C. 24; *Clement v. Chivis*, 9 Barn. & C. 172; *Woodard v. Dowsing*, 2 Man. & R. 74; *Shipley v. Todhunter*, 7 Car. & P. 680; *Parmiter v. Coupland*, 6 Mees. & W. 105.

The American cases on this point follow in the same line with the English. *Runkle v. Meyer*, 3 Yeates, 518; *McCorkle v. Binns*, 5 Bin. 345; *McClurg v. Ross*, Id. 218; *Dexter v. Spear*, 4 Mason, 115; *Dunn v. Winters*, 2 Humph. 512; *Clark v. Binney*, 2 Pick. 113, 116; *Stow v. Converse*, 3 Conn. 325; *Hillhouse v. Dunning*, 6 Conn. 391; *Shelton v. Nance*, 7 B. Mon. 128; *Mayrant v. Richardson*, 1 Nott & McC. 347; *Colby v. Reynolds*, 6 Vt. 489.

It is true that some able jurists agree with *MANSFIELD*, C. J., in doubting whether this distinction between verbal and written or printed slander is well founded in principle, while they recognize the force of the authorities which sustain it. Others maintain it upon reason as well as authority. The subject is discussed with numerous references to cases, old and new, English and American, in a note to *Steele v. Southwick*, in 1 Hare & W. Lead. Cas. (5th Ed.) 123.

Steele v. Southwick was an early case in New York, decided in 1812, and reported in 9 Johns. 214. It was there held that the published words complained of, if they did not import a charge of perjury in the legal sense, were nevertheless libelous, as holding the plaintiff up to contempt and ridicule, as regardless of his obligations as a witness and unworthy of credit, and that they were consequently actionable. We concur entirely in the remarks of the court that "to allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous. It is true that such publications are also indictable as leading to a breach of the peace, but the civil remedy is equally fit and appropriate." We do not mean to say that every indictable libel would be a good foundation for a civil action.

Attention is called in *Stone v. Cooper*, 2 Denio, 293, 294, to one class,—libels upon the dead,—as being one where no private injury would probably result from the publication. It may perhaps be fairly held, as in that case, that, where no special damage is averred or proved, "the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintance or of the public; or has suffered some loss, either in his property, character, or business, or in his domestic or social relations, in consequence of the publication." Whether a mere injury to the feelings, resulting from the publication of an indictable libel, would of itself furnish ground for the maintenance of a civil action, we need not now inquire.

It is sufficient to dispose of this demurrer to hold that, in an action for written or printed slander, though no special

damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence and social intercourse. It cannot be successfully contended that the statements alleged in this writ to have been published by the defendant in his newspaper, of and concerning the plaintiff, would not, if believed, tend strongly to deprive him of public confidence, and expose him to public hatred and contempt. It is not necessary to inquire whether the pleader has not carelessly undertaken to convey by innuendo what should have been made the subject of distinct averments if the publication was to be regarded as importing a charge of a criminal offense against the plaintiff.

Exceptions overruled.

APPLETON, C. J., and WALTON, DICKERSON, DANFORTH, and PETERS, JJ., concurred.

(121 N. Y. 199, 23 N. E. Rep. 1127.)

MOORE v. FRANCIS *et al.*

(Court of Appeals of New York. April 15, 1890.)

LIBEL—WORDS AFFECTING PLAINTIFF IN HIS OCCUPATION—IMPUTING INSANITY.

The publication in a newspaper of a statement that plaintiff, employed as teller in a bank, became mentally deranged by reason of overwork, and that while in that condition he made injurious statements regarding the bank's affairs, which caused it trouble, is libelous *per se*, as tending to injure him in his employment.

Appeal from supreme court, general term, third department.

Action by Amasa R. Moore against John M. Francis and others for libel. Verdict for defendants, and from a judgment of the general term affirming the judgment on the verdict, and an order denying a motion to set aside the same, and for a new trial, plaintiff now appeals.

Matthew Hale, for appellant. R. A. Parmenter, for respondents.

ANDREWS, J. The alleged libelous publication which is the subject of this action was contained in the Troy Times of September 15, 1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was at the time of the publication, and for 18 years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank; and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject. That part of the publication charged to be libelous is as follows: "Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vaca-

tion. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bardwell, and others in consultation. They said that the bank was entirely sound, with a clear surplus of \$100,000; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore; and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors." The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that, by reason of mental derangement, he had become incompetent to discharge his duties, and had caused injury to the bank, etc. The court on the trial was requested by the plaintiff's counsel to rule, as a question of law, that the publication was libelous. The court refused, but submitted the question to the jury. The jury found a verdict for the defendants, and, as the verdict may have proceeded upon the finding that the article was not libelous, the question is presented whether it was *per se* libelous. If it was, the court erred in leaving the question to the jury.

It is the settled law of this state that, in a civil action for libel, where the publication is admitted, and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law, which the court must decide. *Snyder v. Andrews*, 6 Barb. 43; *Matthews v. Beach*, 5 Sandf. 256; *Hunt v. Bennett*, 19 N. Y. 173; *Lewis v. Chapman*, 16 N. Y. 369; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211, 22 N. E. Rep. 365. Of course, an error in submitting the question to the jury would be harmless if their finding that the publication was not libelous was in accordance with its legal character. The import of the article, so far as it bears upon the plaintiff, is plain and unequivocal. The words amount to a distinct affirmation—*First*, that the plaintiff was teller of the bank; *second*, that while acting in this capacity he became mentally deranged; *third*, that the derangement was caused by overwork; *fourth*, that while teller, and suffering from this mental alienation, he made injurious statements in respect to the bank's affairs which occasioned it trouble. The cases of actionable slander were defined by Chief Justice DE GREY in the leading case of *Onslow v. Horne*, 3 Wils. 177; and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which

have produced some special damage. Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander, for the most part, are founded upon such imputations. But the action lies in some cases where the words impute no criminal offense; where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part at least, within the third specification in the opinion of Chief Justice DE GREY, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action not only to protect a man's character as such, but to protect him in his occupation, also, against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by BAYLEY, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business, are actionable." Where proved to have been spoken in relation thereto, the action is supported; and unless the defendant shows a lawful excuse the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. *Craft v. Boite*, 1 Saund. 243; note; *Steele v. Southwick*, 1 Amer. Lead. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable *per se* when spoken of one in his trade or occupation, but not otherwise, without proof of special damage. *Morgan v. Lingen*, 8 Law T. (N. S.) 800; *Joannes v. Burt*, 6 Allen, 236. The imputation of insanity in a written or printed publication is *a fortiori* libelous where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable; but they may be libelous where they would not support an action for oral slander. There are many definitions of "libel." The one by Hamilton in his argument in *People v. Crosswell*, 3 Johns. Cas. 354, viz., "a censorious or ridiculing writing, picture, or sign, made with mischievous and malicious intent towards government, magistrates, or individuals," has often been referred to with approval. But, unless the word "censorious" is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to writ-

ten or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticize or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation may be libelous although they convey no imputation upon his character. Words, says Starkie, are libelous if they affect a person in his profession, trade, or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof." Starkie, *Sland. & L.* § 188. The cases of libel founded upon the imputation of insanity are few. The declaration in *Morgan v. Lingen*, supra, contained a count for libel, and also for verbal slander. The alleged libel was a letter written by the defendant in which he states that "he had no doubt that the plaintiff's mind was affected, and that seriously," and also that "she had a delusion," etc. It appeared that the defendant had also orally stated, in substance, the same thing. It was claimed that the writing was justified. The plaintiff was a governess. *MARTIN, B.*, in summing up to the jury, said that "a statement in writing that a lady's mind is affected, and that seriously, is, without explanation, *prima facie* a libel." In respect to the slander, he said "he thought there was no evidence of any special damage. The jury must, therefore, consider whether the defendant ever intended to use the expressions he did with reference to the plaintiff's profession of governess." In *Perkins v. Mitchell*, 31 Barb. 465, it was held to be libelous to publish of another "that he is insane, and a fit person to be sent to the lunatic asylum;" *EMOTT, J.*, saying: "Upon this point the case is clear." *Rex v. Harvey*, 2 Barn. & C. 257, was an information for libel for publishing in a newspaper that the king "labored under mental insanity, and it stated that the writer communicated the fact from authority." The judge charged that the publication was a libel, and the charge was held to be correct. The foregoing are the only cases we have noticed upon the point whether a written imputation of insanity constitutes a libel. Several of the text-writers state that to charge in writing that a man is insane is libelous. Add. Torts, 168; Townsh. *Sland. & L.* § 177; Starkie, *Sland. & L.* § 164; Ogder, *Sland. & L.* p. 23.

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words, to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupation; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto, and to be such as would tend to prejudice him therein. *Sanderson v. Caldwell*, 45 N. Y. 405, and cases cited. The publication did, we think, touch the plaintiff in respect to his occupation as bank teller. It imputed mental derange-

ment while engaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity, or general capacity. They attributed to him a misfortune brought upon him by an overzealous application in his employment. While the statement was calculated to excite sympathy, and even respect, for the plaintiff, it nevertheless was calculated, also, to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that, in consequence of his conduct in that condition, the bank has been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory, in a legal sense, although it imputed no crime, and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body. The trial judge, therefore, erred in not ruling the question of libel as one of law. The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants; but it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives, and in an honest belief in its truth.

The judgment should be reversed, and a new trial granted.

All concur.

(117 Mass. 539.)

HOMER V. ENGELHARDT.

(Supreme Judicial Court of Massachusetts.
May 8, 1875.)

LIBEL—WORDS AFFECTING PLAINTIFF IN HIS BUSINESS.

The publication in a newspaper of a notice to the public that plaintiff, a saloon-keeper, to get

rid of a just claim in court, set up as a defense an existing prohibitory liquor law, under which no action for the price of liquors sold in violation thereof could be maintained, is not libelous, as he had a legal right to make such defense.

Appeal from superior court.

Action of tort by Valentine Homer against Michael Engelhardt for libel. The declaration alleged that defendant caused to be published in a certain newspaper, printed in the German language, published in Boston, "a false and malicious libel concerning plaintiff, a copy of which is hereto annexed, as follows: 'Dem deutschen Publicum zur Nachricht dass der Wirth Valentine Homer, 1863 Washington Str., um einer gerechten Forderung zu entgehen, als Vertheidigung vor Gericht das bestehende Liquör-Gesetz anführte. Wir halten es für unsere Pflicht solche Fälle zu publiziren um Bierbrauer und Liquörhändler zu warnen. M. ENGELHARDT & Co.'—which, translated into the English language, is as follows: 'Information to the German public. The saloon-keeper, Valentine Homer, No. 1863 Washington street, to get rid of a just claim in court, set up as a defense the existing prohibitory liquor law. We feel it our duty to make such conduct publicly known, in order to caution beer-brewers and liquor dealers. M. ENGELHARDT & Co.'." Defendant demurred to the declaration, on the ground that it did not state a legal cause of action, inasmuch as it contained no actionable words or other cause of action. The demurrer was sustained, and judgment ordered for defendant. Plaintiff appealed.

J. D. Long, (S. B. Allen, with him,) for plaintiff. A. Russ, for defendant.

ENDICOTT, J. No action can be maintained in this commonwealth for the price of liquor sold in violation of law. St. 1869, c. 415, § 63. If such action is brought, it is the right of the defendant to set up in his answer this provision of the statute. It is a perfectly legitimate and legal defense, and stands as other defenses stand which the law interposes to defeat what, under other circumstances, would be a just demand. This publication does not charge that the plaintiff falsely, or even unsuccessfully, set up as a defense the existing prohibitory law. The gist of the damage is simply that he did set up such a defense. The plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so. The demurrer was rightly sustained in the court below.

Judgment affirmed.

(See, also, *Layton v. Harris*, 3 Har. [Del.] 406; *Bradley v. Cramer*, 59 Wis. 309 18 N. W. Rep. 263; *Stone v. Cooper*, 2 Denio, 293; *Lindley v. Horton*, 27 Conn. 58; *Barr v. Moore*, 87 Pa. St. 385; *Achord v. Piper*, 66 Iowa, 694, 24 N. W. Rep. 513; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. Rep. 862.)

III. MALICE IN LIBEL AND SLANDER.

(4 Barn. & C. 247.)

BROMAGE *et al.* v. PROSSER.

(Court of King's Bench. Easter Term, 1825.)

1. SLANDER—MALICE.

In an ordinary case of libel or slander (*i. e.*, one which is not a case of privileged communication) the law implies such malice as is necessary to

maintain the action, such legal malice being deemed to exist when a wrongful act is done intentionally, without just cause or excuse. It is, therefore, not proper to submit this question of malice in such cases to the jury. But where the defamatory words are published on a privileged occasion, and are therefore *prima facie* excusable, malice in fact must be proved by the plaintiff and found by the jury in order to sustain the action.

2. SAME.

In an action for slander in saying that plaintiff's bank had stopped, it appeared that in answer to a question whether such was the fact defendant had said it was true; that he was told so; that it was so reported. The judge instructed the jury that if they thought the words were not spoken maliciously the defendant ought to have their verdict. The jury having found a verdict for the defendant, *held*, on a motion for a new trial, that this instruction, leaving the question of malice to the jury, was erroneous.

Motion for a new trial.

Action for slander for words spoken of plaintiffs in their trade and business as bankers. At the trial the jury found a verdict for defendant. A rule *nisi* for a new trial was obtained by plaintiffs on the ground that the judge at the trial improperly left to the jury the question of malice.

W. E. Taunton and *Mr. Maule*, showed cause. *Mr. Campbell* and *G. R. Cross*, in support of the rule.

BAYLEY, J. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was that, in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "It was true; he had been told so." The evidence was that Watkins met defendant, and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant replied, "I was told so." Defendant had been told at Crickhowell there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but, as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that, if they thought the words were not spoken maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but, if they thought them spoken maliciously, they should find for the plaintiff. The jury having found for the defendant, the question, upon a motion for a new trial, was upon the propriety of this direction.

If, in an ordinary case of slander, (not a case of privileged communication,) want of malice is a question of fact for the consideration of a jury, the direction was right; but if, in such a case, the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that, therefore, the manner and occasion of speaking the words is admissible in evidence to show

they were not spoken with malice, is said to have been agreed (either by all the judges, or, at least, by the four who thought the truth might be given in evidence on the general issue) in *Smith v. Richardson*, Willes, 24; and it is laid down 1 Com. Dig. tit. "Action upon the Case for Defamation," g 5, that the declaration must show a malicious intent in the defendant; and there are some other very useful elementary books in which it is said that malice is the gist of the action; but in what sense the words "malice" or "malicious intent" are here to be understood, whether in the popular sense, or in the sense the law puts upon those expressions, none of these authorities state. "Malice," in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned for felony, and willfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse. *Russ. Crimes*, 614, note 1. And if I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and, if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in *Style*, 392, and was adjudged upon error in *Mercer v. Sparks*, Noy, 35. The objection there was that the words were not charged to have been spoken maliciously, but the court answered that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of speaking or writing 't, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmonson v. Stevenson*, Bull. N. P. 8, Lord Mansfield takes a distinction between these and ordinary actions of slander. In *Weatherston v. Hawkins*, 1 Term R. 110, where a master, who had given a servant a character which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him. Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels; that it had the two essential ingredients, slander and

falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into; and that the same doctrine held in action for words,—no express malice need be proved. Lord MANSFIELD said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and BULLER, J., said this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as "false." BULLER, J., repeats in *Pasley v. Freeman*, 3 Term R. 61, that, for words spoken confidentially, upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*, 4 Burrows, 2425, Lord MANSFIELD states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice; but in an ordinary action for a libel for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on a ground of want of malice. Numberless occasions must have occurred, (particularly in cases where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them, as a previous question, whether the defendant understood Watkins as asking for information for his

own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force that we ought not to grant a new trial on the ground that the evidence did not support any of the counts in the declaration, but, upon carefully attending to the declaration and the evidence, we think we are not warranted in saying there was no evidence to go to the jury to support the declaration; and, had the learned judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We therefore think that we cannot properly refuse a new trial upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice, as a question of fact for the consideration of the jury; for if the jury should think that when Watkins asked his question the defendant understood it as asked, in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice in fact will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case to consider whether this was understood by the defendant as an application to him for advice, and, if not, the question of malice was improperly left to their consideration. We are therefore of opinion that the rule for a new trial must be absolute.

Rule absolute.

IV. PUBLICATION.

(13 Gray, 304.)

SHEFFILL et ux. v. VAN DEUSEN et ux.

(*Supreme Judicial Court of Massachusetts.*
Sept. Term, 1859.)

SLANDER—PUBLICATION OF DEFAMATORY WORDS.

No action can be maintained for the speaking of defamatory words to the person of whom they are spoken only, no one else being present or within hearing. That they were spoken in a public place is immaterial.

Exceptions from court of common pleas.

Action of tort by Hiram Sheffill and wife against George J. Van Deusen and wife for slander. The judge before whom the case was tried signed a bill of exceptions, as follows: "The words claimed to have been slanderous were spoken, if at all, at the dwelling-house of the defendants, and in that part thereof called the 'bakery,' where bread and other articles were sold to customers; and were spoken by Mrs.

Van Deusen to Mrs. Sheffill. The defendants asked the court to instruct the jury that if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action. The court declined so to instruct, but did instruct the jury that, if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shown that any other person was present, at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except."

W. K. Peck, for plaintiffs. *M. Wilcox*, for defendants.

BIGELOW, J. Proof of the publication of the defamatory words alleged in the dec

laration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor. *Edwards v. Wootton*, 12 Coke, 35; *Hickes' Case*, Poph. 139, and Hob. 215; *Wheeler and Appleton's Case*, Godb. 340; *Phillips v. Jansen*, 2 Esp. 624; *Lyle v. Clason*, 1 Caines, 581; *Ham. N. P.* 257. It is quite immaterial, in the present case, that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by a third person? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

([1891] 1 Q. B. 524.)

PULLMAN et al. v. WALTER HILL & Co., Limited.

(*Court of Appeal*. Dec. 19, 1890.)

LIBEL—PUBLICATION.

In an action for libel it appeared that the alleged libel was contained in a letter respecting plaintiffs, two of the members of a partnership, written on behalf of defendants, a limited company, by their managing director, and sent by mail in an envelope addressed to the firm; the writer not knowing that there were other partners in the firm. The letter was dictated by him to a clerk, who took down the words in shorthand, and then wrote them out in full by means of a type-writing machine; and the letter thus written was copied by an office-boy in a copying-press. When it reached its destination, it was opened by a clerk of the firm, in the ordinary course of business, and was read by two other clerks of the firm. *Held*, that there was a publication of the letter, both to defendants' clerks and to plaintiffs' clerks, and that neither was on a privileged occasion.

Motion for new trial.

Action for libel. At the trial it appeared that plaintiffs were members of a partnership firm of R. & J. Pullman, in which there were three other partners. The place of business of the firm was No. 17 Greek street, Soho. The plaintiffs were the owners of some property in the Borough road, which they had contracted, in 1887, to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In

1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter: "Messrs. Pullman & Co., 17 Greek St., Soho. Re Boro' Road. Dear Sirs: We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretenses. We await your reply by return of post. Yours, faithfully, [Signed] WALTER HILL & Co., Limited." This letter was dictated by the defendants' managing director to a short-hand clerk, who transcribed it by a type-writing machine. The type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to "Messrs. Pullman & Co., 17 Greek street, Soho." The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm, in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore nonsuited the plaintiffs, and they moved for a new trial.

Mr. Lockwood, Q. C., and Mr. Oswald, for the motion. *Mr. Murphy, Q. C., and R. M. Bray*, opposed.

ESHER, M. R. Two points were decided by the learned judge: (1) That there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication?" The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there were no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may

copy it for him, is that a publication of the letter? Certainly it is showing it to a third person. The writer cannot say, to the person to whom the letter is addressed, "I have shown it to you, and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was therefore in this case a publication to the type-writer.

Then arises the question of privilege, and that is whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving the character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libeled; it is not a question of privilege, as between the person who makes and the person who receives the communication. The privilege is as against the person who is libeled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs, the persons libeled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore the case does not fall within the rule. Then, again, as to the publication at

the other end,—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs, but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms, and large tradesmen generally, depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that, under such circumstances, there was a publication of the letter by the sender of it, and in this case, also, the occasion was not privileged, for the same reasons as in the former case. There were therefore two publications of the letter, and neither of them was privileged. And there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody. I think there ought to be a new trial.

LOPES, L. J., and KAY, L. J., concurred. Order for new trial.

(See, also, *Wennhak v. Morgan*, 20 Q. B. Div. 635; *Pittard v. Oliver*, [1891,] 1 Q. B. 474; *Bacon v. Railroad Co.*, 55 Mich. 224, 21 N. W. Rep. 324; *Young v. Clegg*, 93 Ind. 371; *Spaivs v. Poundstone*, 87 Ind. 522; *Marble v. Chapin*, 132 Mass. 225; *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. Rep. 41; *Sproul v. Pillsbury*, 72 Me. 20.)

V. DEFENSE OF "JUSTIFICATION."

(19 Kan. 417.)

CASTLE v. HOUSTON.

(*Supreme Court of Kansas*. July Term, 1877.)

1. LIBEL—JUSTIFICATION.

In civil actions for libel, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives and for justifiable ends.

2. SAME—CONSTITUTIONAL PROVISION.

The constitution of Kansas provides (Bill of Rights, § 11) that, "in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused shall be acquitted." *Held*, in construction of this provision, in view of the former rule of law, that proof of the truth of the matter charged as defamatory was a complete justification in a civil action for libel; and that proof that the matter was published for justifiable ends in order that "the accused party

shall be acquitted," was limited to criminal prosecutions.

Error from district court, Leavenworth county.

Action for libel. A verdict for plaintiff, on trial in the district court, was set aside by that court on motion, and a new trial granted. From the order granting the new trial plaintiff appealed, and brought the case to the supreme court on error.

Byron Sherry and *Scott Ashton*, for plaintiff. *T. A. Hurd*, for defendant.

HORTON, C. J. This was an action commenced in the district court of Leavenworth county to recover damages for libel. The petition alleges, in substance, that the defendant was editor, proprietor, and publisher of the *Leavenworth Daily Commercial*, a newspaper printed in the city of

Leavenworth, and that on the 20th of January, 1875, there was published in said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to-wit: "The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same. There is a cadaverous looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with, and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then, doubtless, the Northwestern Life would be glad to hear from him, as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. JACK."

In answer to the petition, defendant set up three defenses: *First*, an admission that the article complained of was published in defendant's paper of and concerning the plaintiff, but denied that the same was published with malice; *second*, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation that the several matters and things in the article complained of as defamatory were true, and published for justifiable ends and purposes; and, *third*, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict of \$1,250; whereupon defendant gave notice of motion for a new trial, which was filed, and, after being argued, was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.: "The fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages. It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted from good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly, for good purposes and justifiable ends, and what he says is true, then he is to be excused or acquitted."

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial, for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libelous matter. It was at one time the rule of the common law that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth, the greater the libel." This doctrine was based upon the theory that, where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party aggrieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule without an opportunity to show by the judgment of a court that he was innocent, was libelous; and, if the matter charged was in fact true, (thereby insuring social ostracism,) the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the star chamber, and was considered at the time an innovation, but, like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of *People v. Crosswell*. In that case the defendant was prosecuted for libel for having published in his newspaper at Hudson, in that state, called the "Wasp," the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of

Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libelous did not amount to a complete justification. 3 Johns. Cas. 336. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was in the courts of New York on a motion for a new trial, the legislature of that state passed a law providing that, in every prosecution for writing or publishing any libel, it should be lawful for the defendant upon the trial to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every state in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star chamber of England, and thereafter generally understood and interpreted, by providing, in section 11 of our bill of rights, that "the liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and, in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Nevertheless these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth, when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the accused should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intentment of the constitution, the legislature afterwards provided, in the act relating to crimes and punishments, that, "in all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and if it appears to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." Section 272, Gen. St. p. 376.

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided, in a succeeding section of the same act, that, "in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to deter-

mine, at their discretion, the law and the fact." Section 275, Gen. St. p. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, Chancellor WALWORTH clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases the defendant was permitted to give the truth in evidence as a full justification." Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there has never been any alteration of the law in England on this subject in civil suits. The case of *King v. Root*, supra, was originally tried at one of the circuits in New York before Hon. SAMUEL R. BETTS. The defendants, King and Verplanck, were editors of the *New York American*, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant governor of that state, among other things, that in August of that year he addressed the state senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco juice trickling from the corners of his mouth, and in a condition outraging all order, decency, and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication, and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is a *damnum absque injuria*, intimating that the acts of the defendant who justifies a libelous publication does not constitute a wrong, in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Comm. 125. This is illogical; and Starkie bases this exemption on the better reason that, in such instances, the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief. His original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. *Folk. Starkie, Sland. & L. (Amer. Ed.)* § 692.

There are many good and sufficient rea-

sons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and yet not be liable in a civil action. On general principles, no right to damages can be founded, on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation, in point of natural justice, is founded on deception and fraud which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society. Take the case of two men who agree to engage together in fist-cuffs; the law, for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feeling of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive, notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses, being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and therefore to extend a remedy to such injuries generally would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. Starkie, *Sland.* & *L.* 35. In this view the truth hurts no one.

In accordance with the doctrine that the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true, it is provided in Civil Code, § 126, that, "in all actions mentioned in the last section, [libel and slander,] the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either." This section of the Code may be construed to mean, "in actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, [as a defense or full justification,] and [he may also allege] any mitigating circumstances [in the same answer] to reduce the

amount of damages, or he may prove either [the truth as a defense or mitigating circumstances to reduce the damages.]" In other words, under the Code, the truth is a full justification in a civil action; and, in the absence of justification, mitigating circumstances may be proved to reduce the damages; and justification and mitigation may be set forth in the same answer, and the defendant may prove either or both. Gen. St. p. 653.

If it be contended that, within the provision of the constitution, the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer that, in view of the rule of law applicable in such cases at the time of the adoption of the state constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and, where an accused is on trial,—that is, where a person charged with a crime for the publication of alleged libelous matter is being tried,—he is not to be acquitted, except the publication is true, and the same was published for justifiable ends. In that event only is the accused party entitled to an acquittal. The word "accused" is used in the constitution, and, an "accused" being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libelous matter, as was doubtless intended by the framers of the constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the state or federal constitutions. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it the harsh rule of the common law, as generally recognized in libel prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law, sustained and upheld under the exacting and arbitrary construction of libels in England, that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the state was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the constitution abridged and curtailed the liberty of the press in civil actions more than the

common law,—more than the provisions of the constitutions of other states. The modification of the common law by the constitution we construe in favor of the liberty of the press, not against it. To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges. The constitution of Rhode Island provides, "in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged." And it was held in that state that the truth of the charge is a good defense in a civil action for libel. *Perry v. Man*, 1 R. I. 263.

From our review of the authorities, the provision of our constitution, the Civil and Criminal Codes, we deduce these important principles: *First*. In all criminal prosecutions the truth of the libel is no defense unless it was for public benefit that the matters charged should be published; or, in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine, at their discretion, the law and the fact. *Second*. In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law. Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have a right to determine the law as well as the fact; but were erroneous in a civil action, where the

facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. *Root v. King*, 7 Cow. 613, 632; *Townsh. Sland. & L.* § 211; *Foss v. Hildreth*, 10 Allen, 76; *Baum v. Clause*, 5 Hill, 196; 1 *Starkie, Sland. & L.* 229; *Rayne v. Taylor*, 14 La. Ann. 406.

The plaintiff in error contends that the instructions could not have been prejudicial to the defendant in error, as the plea of justification was insufficient in form, and therefore the district court erred in granting a new trial. The answer, among other things, alleged "that the matters charged as defamatory were true." No motion was filed in the case to make the answer more definite or certain; no demurrer was presented; no objection taken to the evidence of the truth of the charge, as we can ascertain; and from the record we must assume that the case was tried on the theory that the defendant was attempting to show as justification the truth of the publication; and we may assume that the evidence tended to prove the truth of the publication. Under these circumstances, the point now made by the counsel of the plaintiff as to the immateriality of the instructions is not well taken. The case was heard by the district court on the supposition that the plea of justification was sufficiently formal; the instructions of the court discuss what is necessary to be shown to make the truth a full justification; and, the jury having been misdirected in the hurry of the trial, no error was committed in setting aside the verdict. Had the action of the court been otherwise, on proper application we would have reversed the judgment. If any delay has resulted to the plaintiff in error in obtaining a speedy trial, it has been caused by the pendency of this proceeding in error in this court, where it was brought by the plaintiff. For this action the defendant in error was not responsible.

The order of the district court setting aside the verdict of the jury in the case, and granting a new trial, is affirmed.

All concurred.

(See, also, *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. Rep. 397; *Royce v. Maloney*, 57 Vt. 325; *Perry v. Porter*, 124 Mass. 338; *Drake v. State*, (N. J. Sup.) 20 Atl. Rep. 747; *Hathorn v. Spring Co.*, 44 Hun, 908; *Ellis v. Buzzell*, 60 Me. 209.)

VI. DEFENSE OF "PRIVILEGED COMMUNICATION."

1. Qualified privilege.

(73 Md. 87, 20 Atl. Rep. 774.)

FRESH V. CUTTER.

(*Court of Appeals of Maryland*. Nov. 13, 1890.)

1. SLANDER—PRIVILEGED COMMUNICATIONS—CHARACTER OF SERVANT.

Where the former master of one who is about to enter the service of another, voluntarily, in good faith, without malice, in the honest belief that he is discharging a duty to his neighbor, and

with a full conviction of the truth of his words, tells the new master that the servant has stolen from him, the communication is privileged.

2. SAME.

Punitive damages cannot be allowed in such case without a finding of malice.

3. SAME.

The speaking of such words to a person other than the new master would not be privileged, though made with a belief in their truth.

4. SAME—PLEADING.

A plea of privileged communication, which merely avers that defendant spoke the words to a neighbor who was about to employ plaintiff, in the *bona fide* performance of a duty, without malice, and with an honest belief that they were true, is bad, as not being sufficiently specific.

Appeal from circuit court, Washington county.

The pleas herein successfully demurred to were as follows: "And the defendant, for a second plea, says that he honestly and *bona fide* believed the words spoken by him were true, and that he spoke them to a neighbor who had employed the plaintiff, or was about to employ him, and that he spoke the words to said neighbor in the *bona fide* performance of a duty, and without malice; and for a third plea the defendant says that, when he spoke the alleged slanderous words set forth in the declaration, he honestly and *bona fide* believed them to be true, and that he spoke them only to a neighbor, Mr. Charles Allen, who had employed, or was about to employ, the plaintiff, and that he spoke the said words to said neighbor in the *bona fide* performance of a duty, and without malice."

Argued before ALVEY, C. J., and BRYAN, MILLER, IRVING, FOWLER, BRISCOE, and MCSHERRY, JJ.

Jas. A. McHerry and H. H. Keedy, for appellant. David W. Sloan D. J. Blackiston, and Edward Stake, for appellee.

MCSHERRY, J. Jacob Cutter sued George H. Fresh for defamatory words alleged to have been spoken by the latter of and concerning the former. Cutter had at one time been an employee of Fresh, but after he ceased to occupy that relation, and had entered, or was about to enter, the service of one Allen, Fresh, of his own accord, and without solicitation or inquiry on the part of Allen, said to Allen, "He [meaning the plaintiff] stole as good as two hundred dollars from me, and I want the money." These are the alleged defamatory words. It was shown by the evidence that several persons had communicated information to Fresh which induced him to believe that Cutter had while in his employment stolen from him. It was also shown that when he learned that his neighbor Allen had employed Cutter, he, Fresh, honestly believed that it was his duty to inform Allen of what he knew concerning Cutter; and that he told Allen these things voluntarily, and without being requested, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting Allen upon his guard. He testified that he had not been actuated by malice or ill will, and that he had never had any bad feeling against Cutter. There was some evidence that the words complained of had been spoken by Fresh to a person named Click, though the latter was unable to state whether the language used by the defendant was "took" or "stole."

This brief outline of the facts is sufficient to indicate that the principal question which we are called upon to decide on this appeal is whether the statement made by Fresh to Allen, under the circumstances

named, was a privileged communication or not. If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false. *Beeler v. Jackson*, 64 Md. 593, 2 Atl. Rep. 916. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty," although the communication "contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." *Harrison v. Bush*, 5 El. & Bl. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed, that the character was given without malice, and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and, although the statement as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious. *Starkie, Sland. & L.* 253. If, under the conditions just named, the statement be made in response to an inquiry, it would undoubtedly be privileged. *Weatherston v. Hawkins*, 1 Term R. 110; *Child v. Affleck*, 9 Barn. & C. 403. But in the case at bar it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference if the party has acted honestly, fairly, and without malice, though, when the information has been voluntarily given, this fact, it has been said, may in some cases have a tendency to disclose the motive of the publisher in making the publication. *Townsh. Sland. & L.* § 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as a non-privileged communication, for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice. *Starkie, Sland. & L.* 253. Or, as stated in *Odgers, Sland. & L.* 202: "If it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was

an intimate friend or a relation of mine, and there was no other evidence of malice except that I volunteered the information, the occasion would still be privileged." *Rogers v. Clifton*, 3 Bos. & P. 587; *Pattison v. Jones*, 8 Barn. & C. 585. It is a question for the court whether the statement, if made in good faith, and without malice, is thus privileged. But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its necessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff. *Dale v. Harris*, 109 Mass. 196; *Brow v. Hathaway*, 13 Allen, 239; *Somerville v. Hawkins*, 10 C. B. 583; *Gassett v. Gilbert*, 6 Gray, 94. Or malice may be established by showing that the publication contained matter not relevant to the occasion. *Townsh. Sland. & L.* § 245. Expressions in excess of what the occasion warrants do not *per se* take away the privilege, but such excess may be evidence of malice. *Ruckley v. Kiernan*, 7 Ir. C. L., 75; *Hotchkiss v. Porter*, 30 Conn. 414. It follows from these principles that if the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable because privileged, though spoken voluntarily. It is equally clear that if the words spoken were known to be false and were maliciously spoken, or were voluntarily spoken to one to whom Fresh owed no duty, in the sense heretofore mentioned, the words would be actionable, because not within the privilege.

In view of these conclusions, there was error in granting the appellee's first and second instructions. Those instructions are as follows, viz.: "The plaintiff prays the court to instruct the jury that if they shall believe from the evidence that the words charged in the declaration were spoken of and concerning the plaintiff by the defendant, in the presence and hearing of other persons than the plaintiff, then the plaintiff is entitled to recover in this action." "That if the jury shall find for the plaintiff, they may award such damages as they in their judgment shall think justified by all the circumstances of the case, not only for the purpose of giving compensation for the injury done to the plaintiff, but also for the purpose of punishing the conduct of the defendant." The first instruction was wrong in omitting all reference to the defense of privilege. It directed the jury to find for the plaintiff if they believed the defendant spoke the words in the presence and hearing of other persons than the plaintiff. Under this instruction, the jury were required to return a verdict against the defendant, even though they were satisfied that the words were spoken to Allen alone, in good faith, without malice, in the full belief of their truth, and under the honest conviction that Fresh was only discharging a social

duty to his neighbor in making the communication. This entirely ignored the question of privilege, which was the only defense relied on by the appellant. The second instruction was also erroneous. It allowed punitive damages to be recovered even though the jury were not required to find the existence of actual malice on the part of the appellant. In cases of this character, such is not the law. If the occasion brings the words within a qualified privilege, no damages can be recovered at all, unless the plaintiff shows that actual malice prompted the publication or utterance. The jury should have been so instructed; but they were permitted, not merely to assess damages, but punitive damages, without any regard whatever to the question of malice. It is true these instructions were taken literally from the case of *Padgett v. Sweeting*, 65 Md. 404, 4 Atl. Rep. 887, where they were held by this court to be correct. But that case was widely different from the one at bar. In the former there was no question of privilege. The words, as here, were actionable *per se*, but were not, as in this case it is alleged, spoken on any occasion which justified their utterance. Under the conditions in *Padgett's Case*, the instructions were proper. But the same instructions could not be given in a case like the one before us now, without ignoring all the circumstances admitted in evidence respecting the occasion of the publication, the motive which inspired it, the belief of the defendant in its truth, and the honesty and good faith of its utterance.

The circuit court properly rejected the appellant's first and third prayers. They were defective in several particulars. The first one omits to submit to the jury to find whether the words spoken by the appellant to Allen were the words complained of, and it forbids a recovery at all if the communication made to Allen, whatever it was, was made in good faith, and without malice, even though made to others on an occasion not privileged. In effect, it told the jury, if the evidence sustained the hypothesis of the prayer, to find for the defendant, notwithstanding the evidence before them respecting the statements made to the witness Click. The second prayer, after submitting to the jury to find the good faith, honest belief, sense of duty, and want of malice on the part of the appellant, concludes thus: "Then the verdict of the jury, on account of the said communication to said Allen, must be for the defendant." The declaration alleges that the words were spoken to divers good and worthy citizens of the state. There was some evidence, as we have already stated, tending to show that Click was one of the persons; and the legal sufficiency of that evidence was not brought into question by a prayer for instructions. If the jury believed it, and founded a verdict upon it, they would have been required, had this prayer been granted, to specifically declare that they found, under this prayer, for the defendant as to the words spoken to Allen, and for the plaintiff as to the same words spoken to Click. The conclusion of the prayer was misleading and calculated to

confuse the jury. While it is true that the words spoken would not be actionable under certain conditions when spoken to Allen, and would be actionable in the absence of those conditions when spoken to Click, all that the court could properly do in such a case would be to submit hypothetically to the jury the finding of facts which created the privilege in the one instance, and the opposite facts which destroyed it in the other, and to defue to the jury the legal conclusions arising from those different hypotheses. A specific instruction to find for the defendant as to one of these hypotheses, without any reference whatever to the other, would have been misleading. The appellant pleaded specially the privileged character of the communication, and the appellee demurred to the pleas. The court sustained the demurrer, and in this we think no error is to be found. The pleas were too general. *Odgers, Sland. & L. 644, 645.* The third prayer of the appellee merely defined the meaning of the term "malice," and was free from objection. For the error indicated in granting the appellee's first and second prayers, the judgment must be reversed, and a new trial must be awarded.

(111 N. Y. 143; 19 N. E. Rep. 75.)

BYAM v. COLLINS *et al.*

(*Court of Appeals of New York.* Nov. 27, 1888.)

1. LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—CHARACTER OF SUITOR.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of anything known to the writer concerning any young man the person addressed "went with," or any young man in the place.

2. SAME—CONFIDENTIAL COMMUNICATIONS.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another, nor because they are uttered after the most urgent solicitation, nor because the interview in which they are uttered is obtained at the instance of the person slandered.

3. SAME—IMPLIED MALICE.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.

DANFORTH, J., dissenting.
Reversing 39 Hun, 204.

Appeal from supreme court, general term, fifth department.

Action by William J. Byam against Jennie E. Collins, and Alfred H. Collins, her husband, for libel and slander. Judgment for defendants was affirmed at general term, and plaintiff appeals.

A. J. Abbott, for appellant. James Wood, for respondents.

EARL, J. The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is gener-

ally formulated thus: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & Bl. 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Crompt. M. & R. 181, an earlier case, it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by FOLGER, J., in *Klinck v. Colby*, 46 N. Y. 427, and in *Hamilton v. Eno*, 81 N. Y. 116. In *White v. Nicholls*, 3 How. 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams*, 15 C. B. (N. S.) 393, ERLE, C. J., said: "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in denning what kind of social or moral duty, or what amount of interest, will afford a justification;" and in the same case BYLES, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty, the

combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation, by which private character may be overwhelmed, and irreparable mischief done; and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead v. Richards*, 2 Man. G. & S. *569, *601, COLTMAN, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly, and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others. The propensity to tale-bearing and slander is so strong among mankind, and when suspicions are infused men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected." And in the same case CRESSWELL, J., said: "If the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not know to be true was quite as strong as the duty to communicate to the ship-owner that which he believed to be true."

One may not go about in the community, and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owed a social duty to give them currency, that the victim of them may be avoided; and ordinarily one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home*, 1 Brod. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah, to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey v. Challands*, 8 Car. & P. 234, one Hersford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all,

"If you have anything to do with Storey you will live to repent it. He is a most unprincipled man," etc.; and Lord DENMAN directed a verdict for the plaintiff, because the defendant began by making the statement without waiting to be asked. In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed, with the plaintiff and other members of the church, on a committee to prepare a Christmas festival for the Sunday-school. He declined to serve, and, being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and, being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman; and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet DEVENS, J., in the opinion said: "The ruling requested by the defendant, that the communication made by him to Mrs. Newton was a privileged one, and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York, but he was under no obligation to give any reason therefor, however persistently called upon to do so, and, even if Mrs. Newton had an interest in knowing the character of Mrs. York as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer, and had been engaged in the practice of his profession at Caledonia for several months, and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father, and no brother, and Mrs. Collins had a brother. During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her, because her

father did not go out a great deal, and had no means of knowing, and people would not be apt to tell him;" that she, Mrs. Collins, had a brother, and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged, and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors, and believed them, and therefore did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest, but it was for information about the young men generally with whom she associated. Nor, literally construing the language, did Dora wish for information as to the gossip and rumors afloat as to young men. What she asked for was such facts as Mrs. Collins knew, and not for her opinion about young men, or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony, it was for information about all the young men in her circle. Mrs. Collins was not related to her, and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them even upon request by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged. *York v. Johnson*, supra.

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so, if they did so find. On the contrary, it is clear that Dora would not at the time have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora, and by the

solicitations of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her" upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins, in writing that letter, act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text-books and judicial opinions supporting the contention of the defendant that this letter was in some sense a privileged communication. But after a very careful research I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88. In that case a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character; and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury were satisfied that in writing it he acted *bona*

fide, although the imputations contained in the letter were false, or based upon the most erroneous information, and if he used expressions however harsh, hasty, or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other there would have been a mere question of damage. A case nearer in point is that of *Count Joannes v. Bennett*, 5 Allen, 169. There it was held that a letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that in writing the letter the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not in any way interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before, the same learned court decided the case of *Krebs v. Oliver*, 12 Gray, 239, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words without knowing or ascertaining their truth far outweighs any claim of mere friendship." I am therefore of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was also error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies in part to these verbal slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged the law implies malice. The judge further charged the jury, in sub-

stance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications. There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her; and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But, even if he obtained the interview with her at the solicitation of the plaintiff and as his friend, she could not claim that her slanderous words uttered at such interview were privileged. The trial judge therefore erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out the judgment should be reversed, and a new trial granted.

All concurred, except DANFORTH, J., who dissented.

(46 N. Y. 183.)

SUNDERLIN *et al.* v. BRADSTREET *et al.*

(*Court of Appeals of New York*. Sept. 7, 1871.)

LIBEL—PRIVILEGED COMMUNICATIONS—MERCANTILE AGENCY.

Proprietors of a mercantile agency, whose business is collecting and communicating to subscribers information as to the character, credit, and pecuniary responsibility of merchants, are liable for a false and injurious report of the failure of certain merchants, published and circulated among all the subscribers; as such a communication is privileged only when made in good faith, to one having an interest in the information. That the libelous statement was in cipher, understood by the subscribers only, is not material.

Appeal from supreme court, general term, seventh judicial district.

Action by Lewis Sunderlin and others against Henry Bradstreet and others for libel. Defendants, proprietors of a mercantile agency, published and circulated among the subscribers to their agency a report that plaintiffs, who were merchants, had failed. The report was admitted to be false. At the trial, a verdict was rendered for plaintiffs, and defendants' excep-

tions were ordered to be heard in the first instance at the general term, which overruled the exceptions, and directed judgment for plaintiffs on the verdict. Defendants appealed from the judgment.

Delavan F. Clark, for appellants. *W. F. Cogswell*, for respondents.

ALLEN, J. The only question presented by the appeal has respect to the character and occasion of the publication of the alleged libel, and is, whether the circumstances and occasion of the publication were such as to absolve the defendants from liability, in the absence of proof of express malice; that is, whether it is within the protection of privileged communications. We might properly decide this question upon the authority of *Taylor v. Church*, 8 N. Y. 452, in which this precise question was determined by a unanimous court, seven judges taking part in the decision, the other judge refraining from expressing an opinion, for the reason that he was not present at the argument. The point was made upon the trial of the action, and presented by counsel upon appeal in this court, and was material to be decided for the guidance of the court below, upon a retrial which this court ordered, inasmuch as, if the publication was privileged, it would probably be fatal to the plaintiff's cause of action, and the court, by a deliberate and formal resolve, adjudged that the alleged libel was not a privileged communication. The circumstances under which this judgment was given, as well as the method adopted by the judges in determining this precise question by a formal declaration, entitle the decision to peculiar weight as an authority. That case cannot be distinguished from this in any circumstance favorable to the defendant.

The decision, as abstracted by the reporter, was that "one who undertakes, for an association of merchants in New York, to ascertain the pecuniary standing of merchants and traders residing in other places, who are customers of some of the members of the association, and who furnishes reports to all the members of the association, irrespective of the question whether they have an interest in the question of the standing of such merchants and traders, is liable for any false report made by him prejudicial to the credit of the subject of it, although made honestly, and from information upon which he relied." In the case before us, the defendants were in no sense the agents of an association of merchants, or of their patrons. Of their own volition, and for their own profit, they established a bureau for collecting and disseminating information as to the character, credit, and pecuniary responsibility of merchants and traders throughout the United States. The business is in the nature of an intelligence office; and it is not intended by this to intimate that it is not an entirely lawful and reputable business; or that it is not of general utility; or perhaps a necessity to the commerce and business of the country. All may be conceded that is claimed for it by its friends; but in its conduct and management it must be sub-

jected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others. The information acquired by them was their own, and was communicated to others or made public in such form and upon such terms as the defendants dictated. In the established course of their business, they communicated with their patrons by means of semi-annual publications, with weekly corrections printed and furnished to each; the number of copies of each publication being about 10,000, distributed to every part of the country, among merchants, bankers, and traders. The alleged libel was published in one of the weekly corrections of the regular semi-annual publications, and was thus extensively circulated. Its distribution was general among all the subscribers to the defendants' publications, irrespective of their interest in the question of the plaintiffs' credit and standing.

Whether a libel or slander is within the protection accorded to privileged communications depends upon the occasion of the publication or utterance, as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged, within the rule, when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information. *Todd v. Hawkins*, 8 Car. & P. 88; *Cockayne v. Hodgkisson*, 5 Car. & P. 543; *Washburn v. Cooke*, 3 Denio, 110; per *SELDEN*, J., *Lewis v. Chapman*, 16 N. Y. 369. It is not necessary to go further in this case; and it may be assumed that, if any one having an interest in knowing the credit and standing of the plaintiffs, or whom the defendants supposed and believed had such interest, had made the inquiry of the defendants, and the statement in the alleged libel had been made in answer to the inquiry in good faith, and upon information upon which the defendants relied, it would have been privileged. This was the case of *Ormsby v. Douglass*, 37 N. Y. 477. The business of the defendant in that action was of a similar character to that of the present defendants; and the statement complained of was made orally, to one interested in the information, upon personal application at the office of the defendant, who refused to make a written statement. There was no other publication, and it was held that the occasion justified the defendant in giving such information as he possessed to the applicant. *Taylor v. Church* was referred to as authority for the rule, and, so far from being overruled or questioned, was affirmed. The decision in *Taylor v. Church* was placed upon the ground that the alleged libel was printed by the procurement of the defendant, and distributed by him to persons having no special interest in being informed of the condition of the plaintiffs' firm. In the case at bar, it is

not pretended but that few, if any, of the persons to whom the 10,000 copies of the libelous publication were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter of others; that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false. When a communication is made in the discharge of some public or private duty, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense, depending on the absence of malice. *Toogood v. Spyring*, 1 Cramp. M. & R. 181; *Fowles v. Bowen*, 30 N. Y. 20. There has been no diversity in the utterances of judges and courts upon the subject, but all have spoken one language. See *Beardsley v. Beardsley*, 5 Blatchf. 498. In those cases in which the publication has been held privileged, the courts have held that there was a reasonable occasion or exigency, which, for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications. The principle of *Taylor v. Church* is recognized in all the cases. *Harris v. Thompson*, 13 C. B. 333; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Harrison v. Bush*, 5 El. & Bl. 344; *Goldstein v. Foss*, 6 Barn. & C. 158; *Getting v. Foss*, 3 Car. & P. 160. That face that the libelous statement was in cipher is not material. It was in language understood by the numerous patrons of the defendants and all the subscribers to the publications. They had the key to the cipher, and the publication was equally significant and injurious as if made in the distinct terms, in the very words, indicated by the numeral figures used. The judgment should be affirmed.

All concur.

Judgment affirmed.

(122 N. Y. 445, 25 N. E. Rep. 919.)

WOODS v. WIMAN.

(*Court of Appeals of New York, Second Division*. Dec. 2, 1890.)

PUBLICATION OF LIBEL—PRIVILEGED COMMUNICATIONS—INFLUENCING ACTION OF PUBLIC OFFICER.

In an action for libel by distributing pamphlets containing defamatory matter, it appeared that defendant gave such a pamphlet to the governor of the state, in order to influence him regarding a bill which had passed the legislature, but there was also some evidence that defendant, at the same time, gave such pamphlets to other persons. *Held*, that the question of publi-

cation should have been left to the jury, since the giving such pamphlets to third persons would not be privileged. 47 Hun, 362, reversed.

Appeal from a judgment of the general term of the second judicial department, affirming a judgment dismissing the complaint.

When the bill which became chapter 672 of the Laws of 1886, relating to imprisonment for debt, was pending in the legislature, Mr. Edward P. Wilder, a lawyer, published a pamphlet in opposition to its passage. Mr. Gilbert R. Hawes, a lawyer, was retained by the debtors imprisoned in Ludlow-Street jail to advocate the passage of the measure, and, to advance this purpose, one McDonald, then imprisoned in that jail on an execution against his person, took from his fellow-prisoners statements of the causes and circumstances of their confinement, which he reduced to writing, and delivered to Mr. Hawes. A few copies of these statements were printed in a pamphlet bearing this title: "Prisoners now in Ludlow-Street jail. A true statement of the facts in each case where a party has been imprisoned for debt. In answer to the pamphlet issued by E. P. Wilder." The pamphlet contained the following, among other, statements: "In re Terrence Monett. About nine years ago sued on breach of promise to marry, which he never made. An open secret that plaintiff had similar relations for money with five or six others; but, being married men, their evidence unattainable at trial. Sympathy for her sex. Awarded \$6,000 damages. His interest sold by sheriff at sale, and bought by plaintiff for \$5,500. The matter then slept for eight years, when an attorney, a friend of plaintiff, dug it up. Both plaintiff and defendant had always lived in Brooklyn, and still so in December, 1884, and the suit and judgment had in Brooklyn court. Instead of issuing execution against him where they both lived, and where the court was that granted judgment, they had him decoyed from Brooklyn to New York, whither they had brought over the execution against the person, thus cutting off from bail in place of domicile; further embarrassing, as New York sheriff requires bondsmen within his limits. Also saved plaintiff expense of support in Brooklyn jail, and, to increase disadvantages of defendant, omitted to credit him, on judgment, with \$5,500, bid for his interest in property at sheriff's sale by plaintiff eight years before, so he was thus arrested on full amount, \$6,000, of judgment. Thus debarred from ability to give bail. Has been eighteen months in jail. On trying to go out under fourteen day act, could not produce written vouchers for expenditure of a few hundred dollars eight or nine years ago; so judgesaid oral evidence was not sufficient, and denied application. His wife's friends offer to subscribe balance really due on judgment, but plaintiff says that, as she cannot have him, his wife (now of nine years) shall not. So this kind of a woman actually separates man and wife to be gratified in her spiteful feelings; but, worst of all, public law aids such." The bill excited much public interest and discussion, and a committee was

appointed, of which the defendant was chairman, to advocate its passage and approval by the executive. After the bill had passed the legislature, the governor fixed a day for hearing a public discussion of its merits. For the purpose of influencing the executive action, and as an answer to the pamphlet put forth by Mr. Wilder, a few copies of the statements of the prisoners, as taken by Mr. McDonald, were carried to the capitol, and one of them was submitted by the defendant to the executive with resolutions adopted by the chamber of commerce, and a memorial signed by several hundred of the citizens of New York and Brooklyn advocating the bill. It is alleged in behalf of the plaintiff that the defendant gave a copy of the pamphlet to the governor, and distributed several copies to persons in the executive chamber, for which alleged publications she seeks to recover damages. On the trial, the plaintiff was nonsuited, upon which a judgment was entered, which was affirmed at general term.

J. Stewart Ross, for appellant. *W. W. MacFarland*, for respondent.

FOLLETT, C. J., (after stating the facts as above.) Whether the public statutes of the state shall be changed is a matter of general interest, and of common concern, and information given to the gov-

ernor for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but, if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged. *Coffin v. Coffin*, 4 Mass. 1; *Rex v. Crevey*, 1 Maule & S. 273; *Odgers, Sland. & L.* (2d Ed.) 186; *Folk. Starkie, Sland. & L.* 202, 205; *Newell, Defam.* 471; *Townsh. Sland. & L.* (4th Ed.) § 217. Had the pamphlet been given only to the executive, we should have no difficulty in sustaining the judgment, on the ground that there was no evidence of malice, without proof of which an action cannot be sustained for such a publication. But one witness testified that he saw the defendant give copies of the pamphlet to persons in the executive chamber, who did not appear to have any connection with the hearing, which was then being held; and, though he was strongly contradicted by persons who had every facility for observing what occurred, yet whether the defendant did distribute the pamphlet, as testified by this witness, was a question of fact, and the court erred in not submitting it to the jury with appropriate instructions. For this error the judgment must be reversed, and a new trial granted, with costs to abide the event. All concur.

Judgment reversed.

(See, also, *Briggs v. Garrett*, 111 Pa. St. 404, 2 Atl. Rep. 513; *Hamilton v. Eno*, 81 N. Y. 116; *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. Rep. 705; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211, 23 N. E. Rep. 365; *Proctor v. Webster*, 16 Q. B. Div. 112; *Jenoure v. Delmege*, [1891,] App. Cas. 73; *Macdougall v. Knight*, 17 Q. B. Div. 636; *White v. Nicholls*, 3 How. 266.)

2. Absolute privilege.

(123 N. Y. 420; 25 N. E. Rep. 1048.)

MOORE v. MANUFACTURERS' NAT. BANK
et al.

(Court of Appeals of New York. Dec. 2, 1890.)

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — JUDICIAL PROCEEDINGS.

A bank sued its cashier on his bond for misappropriating its funds, and served a bill of particulars of the defalcation on defendants' attorney in that action, which charged the funds to have been misappropriated "by collusion with the teller," and gave to a representative of the sureties on the cashier's bond, at his request, a similar statement of the defalcation. There was no other publication. *Held*, that the statements were not privileged communications, and were *prima facie* a libel upon the teller. 4 N. Y. Supp. 378, reversed. *EARL and O'BRIEN, JJ.*, dissenting.

Appeal from supreme court, general term, third department.

Action by Amasa R. Moore against the Manufacturers' National Bank of Troy, and Gleason, its cashier. A verdict for \$200 damages was returned. On appeal by plaintiff the judgment entered on such verdict was affirmed by the general term, (4 N. Y. Supp. 378,) and plaintiff again appeals.

Matthew Hale, for appellant. *R. A. Parmenter*, for respondents.

ANDREWS, J. This is an action for libel. On the trial the plaintiff recovered a small verdict. He appealed to the general term from the judgment in his own favor, on

the ground that the trial judge admitted improper evidence offered by the defendants, and also that he erroneously submitted to the jury the question whether certain facts alleged in the answer of the defendants, in mitigation of damages, existed, although there was an absence of any proof to sustain such allegations. It is claimed that by reason of these errors the plaintiff was prejudiced in respect to the award of damages. There is, we think, no doubt that errors were committed by the trial judge in the respects mentioned. The plaintiff is therefore entitled to a new trial unless the defendants is right in his contention that the alleged libel was a privileged publication, and therefore no recovery whatever was justified. It will be sufficient to state very briefly the facts upon which the action is based, in order to present the question to be determined. In 1883 the Manufacturers' National Bank of Troy, claiming that its cashier had misappropriated and embezzled the property and funds of the institution, brought an action on the cashier's bond against the surviving surety and the representatives of a deceased surety to recover the amount of the alleged defalcation. The agent of some of the defendants in the action thereupon applied in writing to the attorneys of the bank for a statement of the claim. This was furnished, but not in detail, and the agent of the sureties, desiring fuller informa-

tion, called at the banking-house of the bank, and there had an interview with the cashier, and requested him to furnish as particular and complete an account as he could, "so that we could see how we stood." In compliance with the request, the bank, by its cashier, prepared and delivered to the agent of the sureties a paper indorsed, "A partial statement in detail of the defalcations of A. B., late cashier of the Manufacturers' National Bank of Troy," which contained an itemized account, with dates and amounts constituting the claim. The account comprised a statement of alleged false charges made by the cashier in the accounts of depositors, items for drafts and securities of the bank abstracted, and, in addition, items amounting in the aggregate to \$16,621.95, entered in the account as "cash items drawn from the bank by collusion with the teller, without the knowledge or authority of the officers of the bank." The alleged libel for which this action is brought is founded on the words "by collusion with the teller," contained in this statement, and also on a repetition of the same words in a similar account subsequently furnished as a bill of particulars in the action, on the demand of the attorneys for the sureties. The plaintiff in the present action was the teller of the bank during the period of the alleged defalcations by the cashier, and no question is made but that the words "by collusion with the teller," contained in the statement delivered to the agent of the sureties, and in the bill of particulars, referred to him. It cannot admit of question that the publication was libelous, and sustained the action, unless the publication was, as claimed, privileged. It charged the plaintiff with complicity in the crime of embezzlement committed by the cashier. The words are susceptible of no other interpretation. The general doctrine of privilege as applied to actions for libel and slander is founded upon the reasonable view that in the intercourse between members of society, and in proceedings in legislative bodies, and in courts of justice, occasions arise when it becomes necessary or proper that the character and acts of individuals should be considered and made the subject of statement or comment, and that in the interests of society a party making disparaging statements in respect to another on such a lawful occasion should not be subjected to civil responsibility in an action of this character, although such statements were untrue. The law of privilege has been stated by judges in different forms of words, but the comprehensive definition of BLACKBURN, J., in *Davies v. Snead*, L. R. 5 Q. B. 611, as applied to communications between individuals, is especially worthy of notice. "Where," says that learned judge, "a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he, *bona fide* and without malice, does tell them, it is a privileged communication."

There are many examples in the books of communications held to be privileged, where the same words, if used other than

on a lawful occasion, would be libelous, but which, by reason of the occasion when they were published or spoken, will not sustain an action, although proved to be untrue, unless proved to have been spoken maliciously. The cases of charges made in giving the character of a servant, or in answering an authorized inquiry concerning the solvency of a tradesman, or where the communication was confidential between parties having a common interest in the subject to which it relates, are illustrations. *BRONSON, C. J., Washburn v. Cooke*, 3 Denio, 112. In these and like cases the privilege is not absolute, but conditional; that is to say, the occasion being lawful, the communication is *prima facie* privileged, and rebuts the inference of malice which would otherwise arise, and imposes on the plaintiff who prosecutes an action of slander or libel the burden of proving that the defendant was moved by actual malicious intent in making the communication, and, failing in that, he fails in the action. But, as has been said, if the occasion is not a privileged one, the same words may give a right of action, as where an employer, being under no duty, legal, moral, or social, to give information, makes defamatory statements affecting the servant's character, or where a person, under like circumstances, imputes insolvency to a trader. In such cases the law presumes both malice and the falsity of the words, and the defendant is liable for damages unless he can prove that the words were true.

There is another class of privileged communications where the privilege is absolute. They are defined in *Hastings v. Lusk*, 22 Wend. 410. In this class are included slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and also libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action. In questions falling within the absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or, at least, it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant. *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. People*, 1 Denio, 41; *Grover, J., Marsh v. Ellsworth*, 50 N. Y. 309; *Rice v. Coolidge*, 121 Mass. 393; *McLaughlin v. Cowley*, 127 Mass. 316. Where the claim of privilege is interposed as a defense to an action for libel or slander, it is not the test of privilege that the words were uttered or published on a privileged occasion. Where there are several distinct

charges, some privileged and some not privileged, those not privileged are not justified by the charges that are privileged. *Clarke v. Roe*, 4 Ir. C. L. 1; *Tuson v. Evans*, 12 Adol. & El. 733; *Warren v. Warren*, 1 Crompt. & R. 250. The policy upon which the doctrine of privilege rests does not call for an extension of the privilege to such cases. The public interests are sufficiently protected when the privilege is limited to communications which fairly ought to have been made, or, in case of judicial proceedings, to matters not wholly outside of the cause. But no strained or close construction will be indulged to exempt a case from the protection of privilege. Both occasions on which the publication in this case was made were privileged; that is to say, it was the right of the sureties to receive, and it was the reasonable duty of the defendants to give, all proper information bearing upon the claim made by the bank against the sureties. The occasion, therefore, justified the bank in disclosing the facts relating to the alleged defalcation of the cashier, and even if the bank was misinformed, and there had been no defalcation in fact, such information was privileged, and the cashier could have maintained no action, unless perhaps in respect to the first publication on proof of actual malice. But the incorporation into the publication of the statement that the teller acted in collusion with the cashier was, so far as appears, wholly irrelevant, and unnecessary. The teller was not a party to the bond or to the suit. There was an issue which called for an investigation of the teller's conduct. The information that the teller had been in complicity with the cashier was not in response to any inquiry made by the defendant. The information did not on its

face explain, or tend to explain, or establish any fact relevant to the defendant's case against the sureties, nor can it be seen how knowledge of the fact communicated would be of advantage to the sureties. If, upon any ground, the information was relevant or material, as no such ground appears on the face of the publication, we are not at liberty to assume its existence. The burden of showing its relevancy, under the circumstances, was upon the defendants. It is not impossible that a narration on the trial of the facts as to the defalcation of the cashier might incidentally involve a disclosure of the acts of the teller, but this did not, we think, justify the defendants in the publication, in advance of the defamatory matter as to the teller, not, so far as appears, having any relevancy to the liability of the sureties on their bond. *Prima facie* the publication was not privileged. The ordinary consequence follows that malice is presumed from the defamatory nature of the publication, and the defendants must rely for their defense upon a justification (which was not attempted) or upon proof in mitigation of damages. The cases of *Klinck v. Colby*, 46 N. Y. 427, and *Marsh v. Ellsworth*, 50 N. Y. 309, are not inconsistent with the conclusion we have reached. Both cases recognize the rule that the question of privilege depends upon there being a lawful occasion for speaking and the use of words pertinent to that occasion. The conclusion reached requires a reversal of the judgments at the circuit and general term, and a direction for a new trial. Judgments reversed.

RUGER, C. J., and FINCH, PECKHAM, and GRAY, JJ., concurred. EARL and O'BRIEN, JJ., dissented.

(See, also, *Rice v. Coolidge*, 121 Mass. 393; *Hollis v. Meux*, 69 Cal. 625, 11 Pac. Rep. 248; *Barnes v. McCrate*, 32 Me. 442; *Liles v. Gaster*, 42 Ohio St. 631; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744; *Munster v. Lamb*, 11 Q. B. Div. 588.)

VII. CONSTRUCTION OF WORDS—COLLOQUIUM—INNUENDO.

(103 Mass. 37.)

BRETTUN v. ANTHONY.

(*Supreme Judicial Court of Massachusetts*.
Oct. Term, 1869.)

1. SLANDER—PLEADING.

A count of a declaration in an action for slander averred, in substance, the destruction by fire of plaintiff's building with the goods therein, and that the building and goods were at the time insured against damage by fire, and charged that "after said destruction by fire, the defendant, speaking with reference thereto, well knowing that" the building and goods were so insured, accused plaintiff of the crime of willfully burning them with intent to injure the insurers, by words spoken of plaintiff, substantially, that plaintiff "burned the store." *Held*, on demurrer, that this was defective, as the words thus spoken did not alone impute a crime, and the *colloquium* did not extend to the whole of the prefatory inducement; the averments of the necessary facts, and of defendant's knowledge thereof, were not alone sufficient.

2. SAME.

A subsequent count alleged that plaintiff petitioned to be and was adjudged a bankrupt, and that defendant accused plaintiff of the crime of

disposing of his goods with intent to defraud his creditors, and attempting to account for them by fictitious losses, and acts which were offenses under and in violation of the bankrupt act, by words spoken of plaintiff during the pendency of the bankrupt proceedings, substantially the same words as alleged in the preceding count, "the defendant thereby referring to the destruction by fire referred to in the preceding count, by which fire certain memoranda, books," etc., relating to plaintiff's business were destroyed. *Held*, that this count was open to the same objection.

Case reserved on demurrer.

Action of tort by Seth H. Brettun against James H. Anthony for slander. The third count of the declaration alleged that plaintiff was the owner of a certain building, which he occupied with his goods and other chattels for a store; that the building and the goods and other chattels therein were insured against loss or damage by fire, and were destroyed by fire during the time that they were so insured; that, "after said destruction by fire, the defendant, speaking with reference thereto, well knowing that said

building, and also said goods, wares, merchandise, and other chattels therein were insured against loss or damage by fire as aforesaid, publicly, falsely, and maliciously accused the plaintiff of the crime of willfully burning said building, and the goods, wares, merchandise, and other chattels therein, at the time they were so insured against loss or damage by fire, with the intent to injure the insurers thereof, by words spoken of the plaintiff, substantially as follows: 'Some of the folks up your way think that Henry [meaning the plaintiff] burned the store.' 'I [meaning the defendant] have no doubt but what he [meaning the plaintiff] burned it.' The fourth count alleged that plaintiff petitioned for the benefit of the bankrupt act and was duly adjudged a bankrupt, and that the proceedings thereon were still pending; that defendant was a creditor of plaintiff, and had duly proved his claim in bankruptcy; and that defendant, "well knowing that said proceedings in bankruptcy had been commenced as aforesaid, publicly, falsely, and maliciously accused the plaintiff of a crime and misdemeanor, in this: that the plaintiff, with intent to defraud his creditors, within three months before the commencement of the proceedings in bankruptcy on said petition of the plaintiff, did dispose of, otherwise than by *bona fide* transactions in the ordinary way of trade, his goods or chattels obtained on credit and remaining unpaid for; and in this: that the plaintiff did attempt to account for the property, or some part thereof, by fictitious losses or expenses; and in this: that the plaintiff did acts which are offenses under and are in violation of" the bankrupt act, "by words spoken of the plaintiff, during the time of the pendency of said proceedings in bankruptcy, substantially as follows: 'He [meaning the plaintiff] is the biggest rascal off the gallops. Some of the folks up your way think that Henry [meaning the plaintiff] burned the store. I have no doubt but what he [meaning the plaintiff] burned the store,'—the defendant thereby referring to the destruction by fire referred to in the preceding count, by which fire certain memoranda, books, accounts, and other papers relating to the plaintiff's trade or business were destroyed; and that the defendant did publicly, falsely, and maliciously accuse the plaintiff, in words spoken of the plaintiff as above set forth, of acts, matters, and things" whereby plaintiff's discharge in bankruptcy would be withheld, or, if granted, would be invalidated. Defendant demurred to these two counts, on the ground that they set forth no cause of action. The case was reserved for the consideration of the full court.

E. H. Bennett, (W. H. Fox, with him,) in support of the demurrer. *J. Brown* and *C. A. Reed*, opposed.

COLT, J. The sufficiency of two counts in the plaintiff's declaration is submitted upon this demurrer. The words actually used, as set forth in these counts, do not alone impute a crime which would render the plaintiff liable to punishment. They are consistent with a burning caused

without criminal intent, by carelessness or accident; and additional facts are therefore alleged in each count, from which it is claimed the criminal quality of the act appears with certainty. This is to be settled by the familiar rules which govern the pleadings in actions of slander. Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the hearer a charge of crime. This limited protection to reputation the law attempts to give against indirect verbal imputation. It must, however, be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated; and the words, when taken in their plain and natural import, must be capable of the meaning attributed to them. The facts which determine the alleged meaning are usually stated in a prefatory manner, followed by a positive averment, or *colloquium*, that the discourse was of and concerning these circumstances. Whatever the particular order of their arrangement, these averments become material and traversable, and it must appear from them that the words impute the alleged offense. It is a further elementary principle that the *colloquium* must extend to the whole of the prefatory inducement necessary to render the words actionable.

An omission in the respect indicated will not be aided by mere innuendoes, whose office cannot add to or extend the sense or effect of the words set forth, or refer to anything not properly alleged in the declaration. *Snell v. Snow*, 13 Metc. (Mass.) 278. General allegations that the defendant charged the plaintiff falsely and maliciously with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. Thus the act of burning one's own property becomes a crime only under special circumstances, as when done for the purpose of defrauding the insurers or in violation of the provisions of the bankrupt act. Conversation about such burning, otherwise innocent or of doubtful import, may be made actionable, if reference was had in it to those special circumstances, in such manner as necessary to impute the crime. And the declaration is defective if it does not set this forth by suitable averments.

It is no answer that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which make the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered.

Fowle v. Robbins, 12 Mass. 498; Bloss v. Tobey, 2 Pick. 320; Carter v. Andrews, 16 Pick. 1, 5; Sweetapple v. Jesse, 5 Barn. & Adol. 27.

Under the practice act, these rules of pleading still prevail. No averment need now be made which the law does not require to be proved; but all the substantial facts, necessary to constitute the cause of action, must be stated with substantial certainty. *Tebbetts v. Goding*, 9 Gray, 234; *Chenery v. Goodrich*, 98 Mass. 224.

The plaintiff's declaration, on the counts under consideration, does not, in our opinion, meet the requirements here stated. The first count avers, in substance, the destruction of the plaintiff's building, with the goods therein, and the fact that the building and goods were at the time of the loss insured against damage by fire.

It then charges that the defendant, speaking with reference to said destruction by fire, and knowing of the insurance, accused the plaintiff of the crime of burning, with intent to injure the insurer by the words recited. The difficulty is that the words thus spoken are, by reasonable construction, connected with only one of the prefatory allegations, namely, the burning of the building, and [not] with the circumstance of the insurance. They do not, therefore, impute a crime. In other words, the *colloquium* is not co-extensive with the whole inducement which the pleader thought necessary to set out. The other count is open to the same objection, and fails to connect the words with any conversation relating to the plaintiff's bankruptcy, or any acts which are made offenses under the bankrupt act. Demurrer sustained.

(See also, *Van Vechten v. Hopkins*, 5 Johns. 211; *Patterson v. Wilkinson*, 55 Me. 42; *Sturtevant v. Root*, 27 N. H. 69; *Stitzell v. Reynolds*, 59 Pa. St. 438; *Bank v. Henty*, L. R. 7 App. Cas. 741.)

VIII. SLANDER OF TITLE.

(5 N. Y. 14.)

KENDALL V. STONE.

(*Court of Appeals of New York*. July, 1851.)

1. SLANDER OF TITLE—PECUNIARY INJURY.

To maintain an action for slander of title, the words must not only be false, but must be uttered maliciously, and be followed as a natural and legal consequence by pecuniary damage to plaintiff, which must be specially alleged and proved.

2. SAME.

By statements made by defendant as to plaintiff's title to a lot of land, a third person, who had entered into a written contract with plaintiff for the purchase of it, was induced to desire to withdraw from his agreement, to which plaintiff assented, and the contract was rescinded. *Held*, that plaintiff's loss of the sale was not the legal consequence of the words spoken by defendant, and plaintiff could not recover damages from him therefor.

Appeal from superior court of the city of New York, general term.

Action for slander of title. Defendant appealed from a judgment for plaintiff, and from an order denying a motion for a new trial made on a bill of exceptions.

N. Hill, Jr., for appellant. *O. Bushnell*, for respondent.

GARDINER, J. The cause of action in this case is denominated "slander of title" by a figure of speech, in which the title to land is personified, and made subject to many of the rules applicable to personal slander, when the words in themselves are not actionable. To maintain the action, the words must not only be false, but they must be uttered maliciously, (*Smith v. Spooner*, 3 Taunt. 254; *Pater v. Baker*, 3 Man. G. & S. 868,) and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration, and substantially proved on the trial, (*Beach v. Ranney*, 2 Hill, 314; *Crain v. Petrie*, 6 Hill, 524.) The declaration in this case alleges, in the only count to which the evidence applies, that by means

of the grievances divers good citizens, and especially one Asa H. Wheeler, were deterred from purchasing the lands in question, and the plaintiff was prevented from disposing of the same, and thereby deprived of the advantages to be derived from the sale thereof, etc. The loss of a sale to Wheeler is therefore the only special damage incurred by the plaintiff alleged in the declaration and established by the evidence. The superior court place the recovery upon this ground, and it is obviously the only one on which it can be sustained. Before the words were spoken the plaintiff and Wheeler had entered into an agreement in writing for the sale of the lot in question, which was executed by the vendor, and accepted by the vendee, who upon its delivery paid \$250 towards the purchase money. The agreement was obligatory upon both parties. Either could have enforced a specific performance in equity, and thereby attained the precise result contemplated by the contract. Under these circumstances, the representations charged were made by the defendant. The effect of them was not to prevent a sale of the land, for that had been secured by the existing contract. Wheeler was induced by the misrepresentation to desire a relinquishment of the agreement. This was assented to by the plaintiff, the agreement was rescinded, and the note of the vendor received for the amount of the money advanced by the purchaser. This suit was then instituted, and special damages claimed of the defendant, substantially for the non-fulfillment of a contract which had been surrendered by the consent and agreement of the plaintiff. This is a brief statement of the proceeding.

The court charged "that it was pretty manifest, from the testimony of Wheeler, that the plaintiff had sustained damages; that the former would have taken the title, if it had not been for the words spoken by the defendant." To this there was an exception, and the question is wheth-

er the special damage alleged by the plaintiff, which is the gist of the action, was established by this evidence. It has been doubted whether, in any case where there is a subsisting contract, and its performance is prevented by the representations of a third person, an action would lie in behalf of the person with whom the contract was made. The cases are collected in *Moody v. Baker*, 5 Cow. 351. The judges in that case were divided in opinion, but Justice WOODWORTH, who delivered the opinion of the court, conceded that the action would not lie where the contract was for the payment of money; and the principle of the concession extends to every case where a breach of the contract is susceptible of a fixed and definite compensation in money, or where it may, according to the usual practice of the courts, be specifically enforced against the delinquent party.

A misrepresentation which should induce a party to violate a contract for the sale and delivery of goods or stock would no more be the subject of an action than one which should cause the refusal to pay a promissory note. *Morris v. Langdale*, 2 Bos. & P. 284; *Vicars v. Wilcocks*, 8 East, 1. There is no difference in principle between a contract for the delivery of merchandise and for the sale of land, except that in the latter case the remedy of a specific performance is more complete than a pecuniary compensation. My own opinion would be that no action could be sustained in such a case, upon the ground taken in *Vicars v. Wilcocks*, supra, that the damages must be the legal, and not the illegal, consequence of the words spoken. This principle was recognized in *Butler v. Kent*, 19 Johns. 228, and in *Beach v. Ranney*, 2 Hill, 309, that, in an action for words not actionable *per se*, the damage must be "the natural and immediate con-

sequence of the speaking of the words." See, also, *Crain v. Petrie*, 6 Hill, 524, and *Moody v. Baker*, supra, 354. In this case the words charged were not the immediate cause of the non-fulfillment of the contract, in any conceivable view that can be taken. But, if I am wrong in this, there is no case that holds that, where the special damage consists in the violation of a contract, the plaintiff may discharge the obligation, and then recover damages in an action of tort for its non-performance. The right claimed to be affected by the slander originated in and subsisted by virtue of the contract. When that was discharged, it fell with it. The vendor and vendee elected to consider the agreement as null from the beginning. When the suit was instituted, therefore, there could be no injury, for there was no right to be affected. Yet, under these circumstances, the plaintiff has been permitted to recover a thousand dollars by way of damages, because Wheeler wished to be discharged from a purchase of a lot, the stipulated value of which was \$900, and was discharged by the vendee accordingly. In *Bird v. Randall*, 3 Burrows, 1345, the action was for enticing a servant from the employment of the plaintiff. The servant was bound to the master for five years, under a penalty of £100. The plaintiff sued the servant, and recovered judgment, which was paid after the suit against the defendant was at issue and noticed for trial. It was held that the defendant was discharged. The recovery against the servant by him, and payment, put an end to the contract, as Lord Mansfield remarks, and in his reasoning he puts a satisfaction upon the same ground as a release or discharge of the contract. The judgment must be reversed.

Judgment reversed, and new trial ordered.

(See, also, *Like v. McKinstry*, 3 Abb. Dec. 62; *Malachy v. Soper*, 3 Bing. N. C. 371; *Andrew v. Deshler*, 45 N. J. Law, 167; *Wren v. Weild*, L. R. 4 Q. B. 730.)

TRESPASS TO LAND.

I. WHAT CONSTITUTES A TRESPASS.

(74 Me. 163.)

HATCH v. DONNELL.

(*Supreme Judicial Court of Maine*. Nov. 17, 1882.)

TRESPASS TO LAND—WHAT CONSTITUTES.

An entry upon the land of another, without any permission, express or implied, constitutes a trespass, for which damages are recoverable, though merely nominal.

On report.

Action of trespass *quare clausum fregit*. The parties were adjoining owners, the dividing line being in dispute. The declaration alleged two acts of trespass,—one in 1880, when defendant drove his horse

and plow over plaintiff's lands, and one in 1881, when defendant cultivated the land in dispute.

Wm. T. Hall, for plaintiff. *J. W. Spaulding* and *F. J. Boker*, for defendant.

APPLETON, C. J. This is an action of trespass for breaking and entering the plaintiff's close. The lots of the plaintiff and defendant are adjacent. The defendant, when plowing his land, brought his horse and plow on the plaintiff's land, treading down her grass and knocking off bark from her trees. This is the trespass complained of. The defendant had no right of entry upon the plaintiff's land.

His entry was a trespass. Permission was not asked, nor license given. The plaintiff in no way consented and the defendant never asked consent. The parties rely on their strict legal rights, neither asking of nor giving any favor to the other. The relation of the parties—the sedulous care of each to preserve existing rights—negatives the idea of implied, equally as of express, permission or license. In *Harmon v. Harmon*, 61 Me. 222, and in *Lakin v. Ames*, 10 Cush. 198, there was the fact of relationship between the parties, from which, with the other circumstances, license was inferred. Here there was no such fact. No friendly relations were existing between the parties. Their attitude was mutually adverse. The damages are merely nominal.

Judgment for plaintiff for one dollar.

BARROWS, DANFORTH, VIRGIN, PETERS, and SYMONDS, JJ., concurred.

(9 Barb. 652.)

NEWKIRK v. SABLIER.

(*Supreme Court of New York*. Dec. 2, 1850.)

TRESPASS TO LAND—ENTRY TO TAKE AWAY PROPERTY—REPELLING BY FORCE.

Plaintiff, having been forbidden to cross defendant's lands, sent his servant with a team across them. On the servant's return to the bars where he had entered, he found them nailed up; whereupon he left the team on defendant's land, and went and informed plaintiff, who came and commenced tearing down the fence, in order to take away his team, and, persisting in his attempt, after being forbidden by defendant, a fight ensued, and plaintiff was injured. *Held*, that plaintiff had no right to enter upon defendant's land to take away his property without the express or implied consent of defendant, and that defendant had the right to protect his possession and property by force, and was not liable unless the force used was greater than necessary for such purpose.

Appeal from circuit court, Ulster county.

Action for assault and battery. At the trial it appeared that, after defendant had forbidden plaintiff crossing his farm lands, plaintiff sent his servant with a team across such land. The servant entered by taking down bars, which, on his return, he found defendant had nailed up. After an ineffectual attempt to get through, he left the team on defendant's lands, and went after plaintiff, who came and commenced tearing down the fence to take away his team; and, refusing to desist on defendant's demand, a fight ensued, but plaintiff succeeded in getting down the fence and taking his team away. For the injuries to plaintiff in the fight he brought this action. The judge charged the jury that plaintiff had the right to take his team away, even though wrongfully on the premises, and if he did no more damage than necessary for that purpose defendant was not justified in using force, and that the real question was as to whether plaintiff was at the time engaged in wanton and unnecessary destruction of the defendant's fences; to which charge defendant excepted. The jury found a verdict for plaintiff for \$50. From the judgment for plaintiff entered on the verdict, defendant appealed.

T. R. Westbrook, for defendant. *L. S. Chatfield*, for plaintiff.

PARKER, J. I think the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property. The right to land is exclusive; and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. 3 Bl. Comm. 209; *Percival v. Hickey*, 18 Johns. 285. There is a variety of cases where an authority to enter is given by law; as, to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does not commit waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn, for the purpose of getting refreshment there. 3 Bl. Comm. 212; 1 Cow. Treat. 411. In some cases, a license will be implied; as, if a man makes a lease, reserving the trees, he has a right to enter and show them to the purchaser. *Lampet v. Starkey*, 10 Coke, 46. Where the owner of the soil sells the chattels being on his land; as, if he sell a tree, a crop, a horse, or a fanning-mill, which remain within his close, he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises, and take away the subject of his purchase, without being adjudged a trespasser. 1 Cow. Treat. 367; *Bac. Abr. "Trespass," F*; *Winterbourne v. Morgan*, 11 East, 396; 2 Rolle, Abr. 567, m. n. 1. And if a man in virtue of his license erects a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a trespasser for entering and removing it after the revocation. In some cases the motive will excuse the entry. If J. S. goes into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable. *Bac. Abr. "Trespass," F*. And if a stranger chase the beast of A., which is damage-feasant therein, out of the close of B., trespass will lie; for by doing this, although it seems to be for his benefit, B. is deprived of his right to distrain the beast. *Brooke, Abr. "Trespass," pl. 421*; *Keilw. 46*.

In some cases the entry will be excused by necessity; as, if a public highway is impassable, a traveler may go over the adjoining land. *Absor v. French*, 2 Show. 28; *Asser v. Finch*, 2 Lev. 234; *Young v. —*, 1 Ld. Raym. 725. But this would not extend to a private way; for it is the owner's fault if he does not keep it in repair. *Taylor v. Whitehead*, 2 Doug. 747; *Pomfret v. Ricroft*, 1 Saund. 321. So, if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. *Y. B. 37*

Hen. VI. 37, pl. 26. If my tree be blown down, and fall on the land of my neighbor, I may go on and take it away. Brooke, Abr. "Trespasse," pl. 213. And the same rule prevails where fruit falls on the land of my neighbor; I may go and take it away. 1d. pl. 213. And the same rule prevails where fruit falls on the land of another. Millen & Fawdry's Case, Latch, 120. But, if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. Bac. Abr. "Trespasse," F.

Sometimes the right of action depends on the question, which is the first wrong-doer? If J. S. have driven the beast of J. N. into the close of J. S., or if it have been driven therein by a stranger, with the consent of J. S., and J. N. go thereinto and take it away, trespass will not lie, because J. S. was himself the first wrong-doer. 2 Rolle, Abr. 566, pl. 9; Chapman v. Thumblethorp, Cro. Eliz. 329. Tested by that rule, the plaintiff in this suit certainly has no right of action; for he was the first wrong-doer. But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former. The mere fact that the plaintiff owns the chattel gives him no authority to go upon the land of another to get it. In Heermance v. Vernoy, 6 Johns. 5, where A. has entered upon the land of B. without his permission, to take a chattel belonging to A., it was held to be a trespass. So in Blake v. Jerome, 14 Johns. 406, a mare and colt were taken out of the plaintiff's field, by a person who acted under the orders and directions of the defendant, after they had been demanded by the defendant and refused to be delivered to him, and after he had been expressly forbidden to take them; and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on the lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary, the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant after he had been forbidden to do so. And I think the defendant had the right to detain them before they left the premises, and to distrain them damage-feasant. 2 Rev. St. 427. But it is not necessary to decide whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property was unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered the property itself or its value. He had no right to redress himself by force. 1 Bl. Comm. 4. In

pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. Weaver v. Bush, 8 Term R. 78; Gregory v. Hill, 1d. 299; Greene v. Jones, 1 Saund. 296, note 1; Green v. Goddard, 2 Salk. 641; Turner v. Meymott, 1 Bing. 158; 3 Bl. Comm. 5.

The defendant cannot be held liable for the injuries inflicted upon the plaintiff on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury. The judgment of the circuit court must be reversed, and a new trial awarded, costs to abide the event.

(1 N. Y. 515.)

VAN LEUVEN v. LYKE *et al.*

(Court of Appeals of New York. Nov., 1848.)

1. TRESPASS TO LAND—DOMESTIC ANIMALS.

The owner of domestic animals is liable for injuries committed by them while trespassing on the close of another, irrespective of knowledge of their vicious propensities; but he is not liable for injuries by them unless they were trespassing, or he has knowledge of their vicious propensities.

2. SAME.

Plaintiff's cow and calf were killed by being bitten by defendants' sow and pigs in plaintiff's close, while the cow was in the act of calving. *Held*, that plaintiff could not recover, as he did not allege in his declaration or prove at the trial that defendants knew of such vicious propensity on the part of the sow and pigs, or that the animals were trespassing on plaintiff's close.

Error to supreme court.

Action of trespass brought in a justice's court. Plaintiff recovered judgment, which was affirmed on *certiorari* by the court of common pleas, but reversed by the supreme court on error. 4 Denio, 127. To review the judgment of the supreme court plaintiff brought error.

Mr. Schoonmaker, for plaintiff in error.
T. R. Westbrook, for defendants in error.

JEWETT, C. J. It is alleged in the plaintiff's declaration "that on the 27th day of November, 1844, at" etc., "the defendants were the owners of a certain sow and pigs, which sow and pigs, to-wit, on the day and year aforesaid, to-wit, at the place aforesaid, bit, damaged, and mutilated and mangled a certain cow and calf of the plaintiff, while the said cow was in the act of calving, so that said cow and calf both died, to the plaintiff's damage \$50;" to which the defendants pleaded the general issue. There was evidence given on the trial sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said injury. But there is no allegation in the declaration, or evidence given on the trial, that swine pos-

sess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew, or had notice, that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close, and there committed the mischief complained of.

It is a well-settled principle that, in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous. 9 Bac. Abr. tit. "Trespass," 1-505, 506; Jenkins v. Turner, 1 Ld. Raym. 109; Mason v. Keeling, Id. 606, 12 Mod. 332; Rex v. Huggins, 2 Ld. Raym. 1583, 1 Chit. Pl. (Ed. 1812.) 69, 70; Vrooman v. Lawyer, 13 Johns. 339; Hinckley v. Emerson, 4 Cow. 351. But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.

The common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many such animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound, at his peril, to confine them on his own land; and if they escape, and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice in fact of such propensity. 3 Bl. Comm. 211; 1 Chit. Pl. 70. And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure of the former under such circumstances; and, in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close in such action is the substantive al-

legation, and the rest is laid as matter of aggravation only.

This principle is recognized as sound by several adjudged cases. In the case of Beckwith v. Shordike, 4 Burrows, 2092, the action was trespass for entering the plaintiff's close with guns and dogs, and killing his deer. The evidence showed that the defendants entered with guns and dogs, into a close of the plaintiff adjoining to his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held to be sufficient evidence to prove the defendants trespassers, and they were held liable for the injury done by their dog, although it was not shown that they had any knowledge or notice of the propensity of the dog to do such or similar injury. In Angus v. Radin, 5 N. J. Law, 815, the action was trespass for the defendant's oxen breaking into the inclosure of the plaintiff, and there goring his cow, so as to kill her; and upon the ground that the defendant had neglected to confine his oxen on his own land, and that they were trespassing on the land of the plaintiff, he was held liable for the injury done, although it was not alleged or proved that he knew or had notice of the propensity of his oxen to commit such an injury. And so in Dolph v. Ferris, 7 Watts & S. 367, where the action was trespass before a justice of the peace, and there tried without any declaration having been filed. Therefore the court held that the case must be considered as if the case had been tried on the most favorable declaration for the plaintiff which the evidence would have warranted. The evidence was that the bull of the defendant, which was running at large, broke and entered into the inclosure of the plaintiff, where his horse was feeding on the grass growing therein, and gored him so that he died by reason thereof in a few days. The court held it to be clear from the evidence that the defendant might have been declared against for having broken and entered the close of the plaintiff, and the grass and herbage of the plaintiff there lately growing with his bull eaten up, trod down, and consumed, and might also have been charged in the same declaration with having killed or destroyed the plaintiff's horse or colt with his bull. But in the case under consideration there is no allegation charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a *scienter*. Had the plaintiff stated in his declaration such ground of liability, or had charged that the swine broke and entered his close, and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but, as he has not stated in his declaration either ground of liability, the defendants ought not to be deemed to have waived the objection by not making it specifically before the justice. I think the judgment should be affirmed.

Judgment affirmed.

(See, also, Telegraph Co. v. Barnett, 107 Ill. 507; Mairs v. Real-Estate Ass'n, 89 N. Y. 498; Telegraph Co. v. Middleton, 80 N. Y. 408; Brown v. Perkins, 1 Allen, 89; Gregory v. Piper, 9 Barn. & C. 591; Paul v. Summerhayes, 4 Q. B. Div. 9; Anthony v. Haneys, 8 Bing. 186.)

II. TRESPASS IS AN INJURY TO THE POSSESSION.

(15 Ill. 558.)

HALLIGAN v. CHICAGO & R. I. R. Co.

(Supreme Court of Illinois. June Term, 1854.)

1. TRESPASS TO LANDS—WHO MAY MAINTAIN.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is occupied by the owner's tenant, the owner cannot maintain the action.

2. SAME—PLEADING—DUPLICITY.

A single trespass may be committed on several closes, and one action maintained therefor as one trespass.

Appeal from circuit court, La Salle county.

Action of trespass to land, brought by Patrick Halligan against the Chicago & Rock Island Railroad Company. Defendant's demurrer to the declaration was sustained, and plaintiff appealed.

T. L. Dickey and D. Eastman, for appellant. *Chumasero & Taylor*, for appellee.

TREAT, C. J. This was an action of trespass *quare clausum fregit*, brought by Halligan against the Chicago & Rock Island Railroad Company. The first three counts of the declaration alleged, in substance, that the defendant, on the 1st of January, 1853, broke and entered two closes, the property of the plaintiff, situated in the county of La Salle, and described as the west half of lot 10, in block 152, and lot 3, in block 16, in the city of Peru, and pulled down and destroyed two houses standing thereon. The fourth count alleged that the defendant, "on the day and year aforesaid, with force and arms, broke and entered the aforesaid closes of the said Patrick Halligan, and then and there ejected, expelled, put out, and removed the said Patrick Halligan and his family and servants, and divers other persons, to-wit, Michael Pendergast and Alexander Frinkler, tenants of the said Patrick Halligan, (said tenants then and there using and occupying said premises for hire, and paying unto the said Patrick Halligan therefor at the rate of \$1,000 per annum,) from the possession, use, occupation, and enjoyment of the said premises, and kept and continued the said Patrick Halligan and his family and servants, and also his said tenants, so ejected, expelled, put out, and removed, for a long space of time, to-wit, from thence hitherto; whereby the said Patrick Halligan, for and during all that time, lost and was deprived of the use and benefit of the said premises, and of the rents, issues, and profits thereof, accruing to the said Patrick Halligan from said tenants, to-wit, at the county aforesaid, to the damage of the said Patrick Halligan." The defendant demurred to the declaration, and assigned, as special causes of demurrer to the fourth count, that it alleged two distinct causes of action, and showed the *locus in quo* to have been in the possession of other parties. The court over-

ruled the demurrers to the three first counts, and sustained the demurrer to the fourth count. The plaintiff thereupon entered *nolle prosequi* as to the first three counts, and the defendant had judgment on the demurrer to the fourth count.

The question in the case is whether the fourth count shows a cause of action in the plaintiff. The first objection to the count is not tenable. An allegation of a trespass to two or more closes is allowable. A single trespass may be committed on several closes. If a party at the same time enters upon two closes belonging to another, he may be treated as guilty of but one trespass. The owner may, on a single count, recover damages commensurate with the injury. This count alleges an entry on both lots as one act, and is therefore not obnoxious to the charge of duplicity. See *Tapley v. Wainwright*, 5 Barn. & Adol. 395; *Phythian v. White*, 1 Mees. & W. 216.

To maintain trespass *quare clausum fregit*, the plaintiff must have the actual or constructive possession of the premises. The gist of the action is the injury to the possession. If the premises are occupied, the action must be brought by the party in possession; if unoccupied, by the party having the title and the right to the possession. The owner cannot maintain the action, where the land is in the occupancy of his tenant. The trespass is a disturbance of the tenant's possession, and he alone can bring the action. Bac. Abr. "Trespass," c. 3; 1 Chit. Pl. 202; *Campbell v. Arnold*, 1 Johns. 511; *Holmes v. Seely*, 19 Wend. 507; *Bartlett v. Perkins*, 13 Me. 87; *Roussin v. Benton*, 6 Mo. 592; *Davis v. Clancy*, 3 McCord, 422. If the trespass is prejudicial to the inheritance, the remedy of the owner is by an action on the case. He may, in that form of action, recover damages for any injury to the freehold. *Bedingfield v. Onslow*, 3 Lev. 209; *Jesser v. Gifford*, 4 Burrows, 2141; *Lienow v. Ritchie*, 8 Pick. 235; *Brown v. Dinsmoor*, 3 N. H. 103; *Randall v. Cleaveland*, 6 Conn. 328; *Hall v. Snowhill*, 14 N. J. Law, 8.

If Pendergast and Frinkler were in the possession of the lots as the tenants of the plaintiff when the injury was committed, it is clear that they alone can maintain trespass. In such event, the entry was an interference with their possession. The plaintiff had no possession to be invaded. For an injury to the reversion, he has an adequate remedy in another form of action. The count in question does not disclose a state of case that entitles the plaintiff to maintain the action of trespass. It shows that the lots were in the actual possession of his tenants. It alleges that his "tenants were then and there using and occupying said premises for hire, and paying unto him therefor at the rate of \$1,000 per annum." This language clearly implies a leasing of the whole of the lots, and an exclusive possession thereof by the tenants. Nor is there anything in the count that is necessarily

inconsistent with the truth of this averment. It indeed alleges an expulsion of the plaintiff and his family from the lots. It may, however, be that they were temporarily on the premises as the guests of the tenants, or for some purpose consistent with an exclusive right in the tenants. If so, the injury complained of only amounted to a trespass to their persons. The count does not show such a possession in the plaintiff as authorizes him to maintain trespass *quare clausum fregit*. It ought clearly to show that he had the actual or constructive possession of the premises, or some part thereof. If the lease reserved a part of the lots, or if the plaintiff was at the time of the trespass in the exclusive possession of some portion thereof, the count should so have stated. As respects such portion, the action might be sustained. There was no occasion for the plaintiff to refer to the lease; but, having introduced it into the declaration, it was incumbent on him to show that it did not conclude him from maintaining the action.

There are some cases which hold that trespass *quare clausum fregit* may be maintained by the owner for an injury to the freehold, though the land may be in the possession of his tenant at will.

(See, also, *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. Rep. 62; *Bascom v. Dempsey*, 143 Mass. 409, 9 N. E. Rep. 744; *Alexander v. Hard*, 64 N. Y. 228; *Chandler v. Walker*, 21 N. H. 232; *More v. Ferry*, 61 Mo. 174.)

Starr v. Jackson, 11 Mass. 519; *Hingham v. Sprague*, 15 Pick. 102; *Curtiss v. Hoyt*, 19 Conn. 154; *Davis v. Nash*, 32 Me. 411. And it is insisted that this action may be sustained on the authority of these cases. But there is a conclusive answer to this position. It does not appear that the parties in possession were the tenants at will of the plaintiff. The precise character of the tenancy is not stated in the declaration. It is alleged that *Pendergast* and *Frinkler* were the lessees of the premises, paying rent therefor at the rate of \$1,000 per annum. The inference from this statement is that the demise was for a definite period, as a month or a year, rather than at the mere will of the lessor. In order to sustain the case on the ground indicated, it should distinctly appear that *Pendergast* and *Frinkler* were tenants at the will of the plaintiff. Intendments are not indulged to sustain a pleading. If subject to the charge of uncertainty or ambiguity, it is to be construed most strongly against the pleader. If an allegation is equivocal, and two meanings present themselves, the one will be adopted that is most unfavorable to the party pleading. 1 Chit. Pl. 272; Steph. Pl. 379.

The judgment is affirmed.

III. TRESPASS AB INITIO.

(8 Coke, 146a, 1 Smith, Lead. Cas. 62.)

SIX CARPENTERS' CASE.

(Court of King's Bench. Michaelmas Term, 1610.)

1. TRESPASS TO LAND—AB INITIO.

The abuse of a license to enter premises given by law makes the party a trespasser *ab initio*; but otherwise where the license to enter was given by the person in possession.

2. SAME—WHAT CONSTITUTES.

Defendants went into plaintiff's public tavern, ordered and drank wine, and then refused to pay for it. *Held*, that they were not trespassers *ab initio*; for the mere not doing is no trespass.

In trespass brought by *John Vaux* against *Thomas Newman*, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1st September, 7 Jac., in London, in the parish of St. Giles extra Cripplegate, in the ward of Cripplegate, etc., and upon the new assignment, the plaintiff assigned the trespass in a house called the "Queen's Head." The defendants to all the trespass *præter fractionem domus* pleaded not guilty, and as to the breaking of the house, said that the said house *præd' tempore quo*, etc., *et din antea et postea*, was a common wine tavern, of the said *John Vaux*, with a common sign at the door of the said house fixed, etc., by force whereof the defendants, *præd' tempore quo*, etc., viz., *hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, etc. The plaintiff, by way of replication, did confess that the said house was a common tavern, and that they entered into

it, and bought and drank a quart of wine, and paid for it; but further said that one *John Ridding*, servant of the said *John Vaux*, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law) makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or¹ license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority, or license, is given by the² party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is that in the case of a general authority or license³ of law, the law adjudges by the subsequent act *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*.⁴ But when the party gives an authority or

¹ 2 Rolle, Abr. 561; *Bagshaw v. Gaward*, Yelv. 96, 97.

² 3 Bl. Comm. 213; 3 Hen. VII. 11a; Perk. § 191; *Bagshaw v. Gaward*, Yelv. 96, 97; 21 Edw. IV. 19b.

³ 2 Rolle, Abr. 561; 21 Edw. IV. 19b, 76b, per *CATESBY*; *Bagshaw v. Gaward*, Yelv. 96, 97; Perk. § 191, 5 Hen. VII. 11a.

⁴ *Vide* 11 Hen. IV. 75b.

license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn or tavern: so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like.⁵ But if he who enters into the inn or tavern doth a trespass, as if he⁶ carries away anything; or if the lord who distrains for rent or the owner for damage-feasant, works or kills the⁷ distress; or if he who enters to see waste breaks the house, or⁸ stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if⁹ a purveyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 Hen. VI. 19b. *Et sic de similibus*.

2. It was resolved *per totam curiam*, that¹⁰ not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*, and therewith agrees 33 Hen. VI. 47a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to redeliver them, now if he sues a replevin, he shall recover¹¹ damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees Fitzh. Nat. Brev. 69g, *temp. Edw. I.* "Replevin," 27; 27 Eliz. 3, 88; 45 Eliz. 3, 9. So in the case at bar, for not¹² paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point¹³ 12 Edw. IV. 9b. For there Pigot, Serjt., puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his

entry. To which BRIAN, C. J., said, the said case which PIGOT has put is not¹⁴ law, for it is no trespass, but the taverner shall have an action of debt; and therefore¹⁵ BROWN held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt; but the tailor in such a case shall have¹⁶ a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A. and that A. would pay him as much for making, and all the necessities thereto, as he should deserve, and that for making thereof, and all necessities thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor over-values the making, or the necessities to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessities thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, etc., for so much, unless it is so especially agreed. But in such case he may¹⁷ detain the garment until he is paid, as the hostler may the horse.¹⁸ And all this was resolved by the court. *Vide* the book in 30 Ass. pl. 3S, John Matrever's Case, it is held by the court, that if the lord or his bailiff comes to distrain, and¹⁹ before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 Edw. III. 8b, in the Mr. of St. Mark's Case; and so is the opinion of Hull to be understood in 13 Hen. IV. 20 17b, which opinion is not well abridged in title "Trespass," 180. Note, reader, this difference, that tender upon the²¹ land before the²² distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after²³ the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of

⁵ *Vide* 12 Edw. IV. 8b; 21 Edw. IV. 19b; 5 Hen. VII. 11a; 9 Hen. VI. 29b; 11 Hen. IV. 75b; 3 Hen. VI. 15b; 23 Hen. VI. 5b.

⁶ Perk. § 191; 2 Edw. IV. 5; Daw v. Golding, Cro. Car. 196; Bagshaw v. Gaward, Yelv. 96.

⁷ 12 Edw. IV. 8b; Downman's Case, 9 Coke, 11a; 1 And. 65; Bagshaw v. Gaward, Cro. Jac. 143; Perk. § 191.

⁸ 2 Rolle, Abr. 561; 11 Hen. IV. 75b; Fitzh. Nat. Brev. "Trespass," 176; Brooke, Abr. "Trespass," 97; Brooke, Abr. "Replica," 12.

⁹ 3 Rolle, Abr. 561; 18 Hen. VI. 9b; 2 Inst. 546.

¹⁰ Daw v. Golding, Cro. Car. 196; Isaack v. Clark, 2 Bulst. 312; 1 Rolle, 130; Shapcott v. Mugford, 1 Ld. Raym. 185; Mayse v. Cocksedg, Willes, 637; Winterbourne v. Morgan, 11 East, 402.

¹¹ Beare & Hodge's Case, Litt. R. 34; Doct. & Stud. lib. 2, 112b; Het. 16.

¹² Isaack v. Clarke, 1 Rolle, 60, 2 Bulst. 312.

¹³ Roberts v. Herbert, 1 Sid. 5; 12 Eliz. 4, 9a, 9b.

¹⁴ 12 Edw. IV. 9b, N. It is good law.

¹⁵ 12 Edw. IV. 9b.

¹⁶ Roberts v. Herbert, 1 Sid. 5.

¹⁷ Cowper v. Andrews, Hob. 42; Hostler's Case, Yelv. 67; Chapman v. Allen, Cro. Car. 271, 272; Bradb. Dist. 71; Warren v. Perkins, Palm. 223; Mackerney v. Erwin, Hut. 101; 22 Edw. IV. 49b; Watbroke v. Griffith, Moore, 877; 5 Edw. IV. 2b; Robinson v. Waller, 1 Rolle, 449; Rosse v. Bramsted, 2 Rolle, 438; 2 Rolle, Abr. 55, 92; Robinson v. Walter, 3 Bulst. 269, 270.

¹⁸ *Vide* Bradb. Dist. 37.

¹⁹ Bradb. Dist. 37; Br. Tender, etc., 18.

²⁰ 2 Rolle, Abr. 561.

²¹ 2 Sid. 40.

²² Pilkington's Case, 5 Coke, 76a; 2 Inst. 107.

²³ 2 Rolle, Abr. 561; 1 Brown & G. 173; 2 Inst. 107; Pilkington's Case, 5 Coke, 76a; 12 Mod. 461; Winnard v. Foster, Lutw. 1596; Gilb. Ch. 82.

the law, to be there determined. But after the law has determined it, and the avowant has returned irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after; or he may, upon satisfaction made in court, have a writ for the redelivery of his goods; and there-with agree the said books in 13 Hen. IV.

(See, also, *Allen v. Crofoot*, 5 Wend. 506; *Jewell v. Mahood*, 44 N. H. 474; *Esty v. Wilmot*, 15 Gray, 168; *Dingley v. Buffum*, 57 Me. 379; *Narehood v. Wilhelm*, 69 Pa. St. 64; *Brock v. Stimson*, 103 Mass. 520.)

IV. TRESPASS BY JOINT TENANT.

(7 Man., G. & S. 441.)

MURRAY *et al.* v. HALL.

(Court of Common Pleas. Feb. 14, 1849.)

TRESPASS TO LAND—OUSTER OF CO-TENANT.

Trespass will lie by one tenant in common against another for an actual ouster of possession.

Rule to show cause why nonsuit should not be entered.

Action of trespass brought by Murray, Ash & Kennedy for breaking and entering the dwelling-house of plaintiffs, and expelling them therefrom, and seizing and converting their goods. On the trial before MAULE, J., it appeared that the premises in question had been leased by defendant, Hall, to the three plaintiffs and one Hart for a coffee-room, and that Hart surrendered his interest to Hall, who subsequently, with Hart, forcibly expelled from the premises the person put in charge thereof by plaintiffs, and kept possession. A verdict was rendered for plaintiffs for £35 damages. Defendant, on leave reserved at the trial, obtained a rule *nisi* to enter a nonsuit.

Mr. Parry, for defendant. Mr. Channell, Serj., and Mr. Wallinger, for plaintiffs.

COLTMAN, J. This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom; to which the defendant pleaded—*First*, not guilty; *secondly*, leave and license; *thirdly*, a denial that the dwelling-house was the plaintiffs'. At the trial before MAULE, J., one ground of defense was that the defendant was tenant in common of the house with the plaintiffs, and that, therefore, the action was not maintainable. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict

ought to be for the plaintiffs. The jury found for the plaintiffs damages £35. The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered, (pursuant to leave given at the trial,) on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion. On showing cause, it was argued (before the lord chief justice, and Justices COLTMAN, CRESSWELL, and V. WILLIAMS,) that this defense, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point, for we are of opinion that the defense is not sustainable. The court has felt some difficulty on the question, by reason only of the doubts expressed by LITTLEDALE, J., in his judgment in *Cubitt v. Porter*, 8 Barn. & C. 269. That learned judge there said that although, if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that, in trespass, the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And as it has been further established in the case of *Goodtitle v. Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested. We are therefore of the opinion that the direction of MAULE, J., at the trial was right, and consequently this rule must be discharged.

Rule discharged.

(See, also, *Filbert v. Hoff*, 42 Pa. St. 97; *Byam v. Bickford*, 140 Mass. 31, 2 N. E. Rep. 687; *Dubois v. Beaver*, 25 N. Y. 123, 123.)

V. DEFENSES:—LICENSE, NECESSITY, ETC.

(15 Gray, 441.)

GILES v. SIMONDS.

(Supreme Judicial Court of Massachusetts. June, 1860.)

TRESPASS TO LAND—SALE OF STANDING TREES—LICENSE TO ENTER—REVOCATION.

A verbal contract for the sale of standing trees, to be cut and removed by the purchaser, gives an

implied license to enter for the purpose of cutting and removing the same. But such license is revocable at any time, even after full consideration paid, except as to an entry for the purpose of removing those trees cut before the revocation.

Exceptions from superior court, Franklin county.

Action of tort for breaking and entering plaintiff's close, and cutting trees standing thereon, which defendant justified under a verbal contract of sale of the trees. The consideration had been paid, and part of the trees had been felled and removed, when plaintiff revoked his license to go upon the land. The jury found a verdict for defendant. Plaintiff alleged exceptions.

C. Allen and S. T. Field, for plaintiff. A. Brainard, for defendant.

BIGELOW, J. If the plaintiff had a right to revoke the license to enter upon his land, under which the defendant seeks to justify the acts of trespass alleged in the declaration, it is entirely clear that the verdict rendered in favor of the defendant cannot stand. The decision of the case turns, therefore, on the question whether an owner of land, who has entered into a verbal contract for the sale of standing wood and timber to be cut and severed from the freehold by the vendee, can, at his pleasure, revoke the license which he thereby gives to the purchaser to enter on his land, and cut and carry away the wood or timber included in the contract. That such a contract is not invalid as passing an interest in the land is too well settled to admit of doubt. It is only an executory contract of sale, to be construed as conveying an interest in the trees when they shall be severed from the freehold, and shall become converted into personal property. Nor does the permission to enter on the land, which such a contract expressly or by implication confers on the vendee, operate to create or vest in him any estate or interest in the premises. It is only a license or authority to do certain acts on the land, which but for such license or authority would be acts of trespass. If it were otherwise, if under such a contract a right were conferred on the vendee to enter on the land, and then to exercise a right or privilege at his own pleasure, free from the control of the owner of the land, during the continuance of the contract, it would clearly confer on the vendee a right or interest in the premises, which would contravene the statute of frauds. *Rev. St. c. 74, § 1.* There can be no doubt that a valid license to enter on land may be given by parol. But this rule rests on the distinction that a license is only an authority to do an act, or series of acts, on the land of another, and passes no estate or interest therein.

The nature and extent of the right or authority conferred by a license, and how far it is within the power of the licensor to modify or revoke it, have given rise to much discussion and many nice and subtle distinctions in the books, as well as conflicting decisions in the courts of common law. Certain principles, however, seem now to be well settled. If the owner of land sells chattels or other personal property situated on his land, the vendee thereby obtains an implied license to enter on the premises, and take possession of and remove the property. In such case the license is coupled with and supported by a valid interest or title in the property

sold, and cannot be revoked. *Wood v. Manley, 11 Adol. & E. 34; Heath v. Randall, 4 Cush. 195.* So, too, if the owner of chattels or other personal property, by virtue of a contract with or the permission of the owner of land, places his property on the land, the license to enter upon it, for the purpose of taking and removing the property, is irrevocable. *Patrick v. Colerick, 3 Mees. & W. 483; Russell v. Richards, 10 Me. 429, and 11 Me. 371. Smith v. Benson, 1 Hill, 176.* The right of property in the chattels draws after it the right of possession. The license to enter on land to obtain possession of them is subsidiary to this right of property, which cannot be enjoyed if the license be withdrawn or terminated. This right in the chattels is not derived from the license, but exists in the owner by virtue of a distinct and separate title, the validity of which in no way depends on any right or interest in the land. But, with the assent of the owner of the land, the property has been placed in a situation where it cannot be used or enjoyed except by a license to enter upon his land. The continuance of this license is therefore essential to the enjoyment of the right. It would be a manifest breach of good faith to permit such a license to be revoked. No man should be permitted to keep the property of others by inducing them to place it upon his land, and then denying them the right to enter to regain its possession. A party is therefore not permitted to withdraw his consent, by setting up his title to the land, after it has been acted on by others, and when their rights will be impaired or lost by its withdrawal. In like manner, and for similar reasons, a license to enter on land for the purpose of removing trees or timber therefrom, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. By virtue of the contract, and with the express or implied consent of the owner of the soil, the vendee has been induced to expend his money and services. The trees, so far as they have been severed from the freehold, have been converted into personal property, and vested in the vendee. A revocation of the license would, to the extent to which it had been executed, operate as a fraud on the vendee, and deprive him of property to which he had become legally entitled. Besides, the owner of the land cannot, by a subsequent revocation of his license, render that unlawful which, with all its incidents and necessary consequences, was lawful at the time it was done, by virtue of his own authority and consent. The true distinction between an executory verbal license to enter on land under a contract for the sale of timber or trees growing thereon, and a similar license executed, seems to be this: The former confers no vested interest or property, no money or labor is expended on the faith of it, and no right or title is impaired or lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licensor for a breach of the contract. It cannot be held to extend further, so as to confer

a right to use the land of another without his consent, because it would thus confer, *ex proprio vigore*, an interest in land, which cannot be created except by a writing. But such a license executed, to the extent to which it has been acted on, has operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has therefore been held that such a license, while it is executory, may be countermanded, but that when executed it becomes irrevocable. *Cook v. Stearns*, 11 Mass. 533; *Cheever v. Pearson*, 16 Pick. 273; *Ruggles v. Lesure*, 24 Pick. 190;

Clafin v. Carpenter, 4 Mete. (Mass.) 580; *Nettleton v. Sikes*, 8 Mete. (Mass.) 34.

Applying these principles to the case before us, it is clear that the defendant could not justify the acts of trespass charged in the declaration. Before his entry on the land for the purpose of cutting trees, the plaintiff revoked the license which he had given by the verbal contract of sale under which the defendant claimed to act. So far as the license was executory, it was revocable, and the entry of the defendant after its revocation was unlawful. The view which we have taken of the case seems to render a decision of the other questions raised by the exceptions unnecessary.

Exceptions sustained.

(See, also, *Blaisdell v. Railroad Co.*, 51 N. H. 485; *Babcock v. Utter*, 1 Abb. Dec. 27; *Fargis v. Walton*, 107 N. Y. 398, 14 N. E. Rep. 303; *Lockhart v. Geir*, 54 Wis. 133, 11 N. W. Rep. 254; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. Rep. 149; *Fursell v. Stover*, 110 Pa. St. 43, 20 Atl. Rep. 403; *Wood v. Leadbitter*, 13 Mees. & W. 883.)

(113 Mass. 376.)

PROCTOR v. ADAMS *et al.*

(*Supreme Judicial Court of Massachusetts.*
Nov. Term, 1873.)

TRESPASS TO LAND—ENTRY TO SAVE PROPERTY.

The entry upon the land of another, and removing a boat wrecked thereon, the property of third persons, is not a trespass, if the object was to prevent the loss or destruction of the boat by the elements, and restore it to the owner, and not to remove it under a claim of ownership.

On report from superior court.

Action of tort in the nature of trespass *quare clausum* for entering plaintiff's close and carrying away a boat. The boat was a wreck cast upon plaintiff's beach between high and low water mark, found by defendants after a severe storm. They drew it up to high-water mark, but, not thinking it safe, subsequently took it away. They advertised it, and it was claimed by the owners, who paid them for their services and expenses, and took possession of it. The court ruled that these facts did not constitute a defense, and, defendants refusing to go to the jury on the instructions proposed, the judge reported the case to the supreme court.

E. F. Stone, for defendants. *S. B. Ives, Jr.*, for plaintiff.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. *Bl. Comm.* 106; *Chase v. Corcoran*, 106 Mass. 286, 288. Neither the finders of the boat, nor the owners of the beach, nor the commonwealth, had any title to the boat as against its former owner. *Body of Liberties*, art. 90; *Anc. Chart.* 211; 2 Mass. Col. Rec. 143; *St.* 1814, c. 170; *Rev. St.* c. 57; *Gen. St.* c. 81; 3 *Dane*, Abr. 134, 136, 138, 144; 2 *Kent, Comm.* 322, 359. But the owner of the land on which the boat was cast was under no

duty to save it for him. *Sutton v. Buck*, 2 Taunt. 302, 312.

If the boat, being upon the land between high and low water mark owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. *Barker v. Bates*, 13 Pick. 255; *Dunwich v. Sterry*, 1 Barn. & Adol. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 *Hen. VII.* 27, 28, pl. 5; *Brooke*, Abr. "Trespass," 213; *Vin. Abr.* "Trespass," (H, a, 4,) pl. 24 ad fin.; *Id.* (K, a,) pl. 3. In *Dunwich v. Sterry*, 1 Barn. & Adol. 831, a case very like this, Mr. Justice PARKE (afterwards Baron PARKE and Lord WENSLEYDALE) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own, and to put the plaintiffs to a proof of their title. In *Barker v. Bates*, 13 Pick. 255, upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit. The defendants are therefore entitled to a new trial. As the answer was not objected to, and the declaration may be amended in the court below, we have not considered the form of the pleadings.

New trial ordered.

(See, also, *Print Works v. Lawrence*, 23 N. J. Law, 9, 590; *New York v. Lord*, 18 Wend. 126.)

(7 Cush. 403.)

CAMPBELL v. RACE.

*(Supreme Judicial Court of Massachusetts.
September Term, 1851.)*

TRESPASS TO LAND—NECESSITY—OBSTRUCTIONS TO HIGHWAY.

Where a highway becomes obstructed and impassable from temporary causes, a traveler has the right to go upon adjoining lands and so pass by without being guilty of trespass.

Exceptions from court of common pleas.

Action of trespass to land. Defendant justified going upon plaintiff's lands under a right of way of necessity resulting from the impassable state of the adjoining highway by snow-drifts. The court ruled that such fact constituted no defense. A verdict was returned for plaintiff. Defendant alleged exceptions.

W. Porter and J. C. Wolcott, for defendant. *I. Sumner*, for plaintiff.

BIGELOW, J. It is not controverted by the counsel for the plaintiff that the rule of law is well settled in England that, where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books, (2 Bl. Comm. 36; Woolr. Ways, 50, 51; 3 Cruise, Dig. 89; Wellb. Ways, 38;) and it is fully supported by the adjudged cases, (Henn's Case, W. Jones, 296; Osborne v. Sture, 3 Salk. 182; Pomfret v. Ricroft, 1 Saund. 323, note 3; Absor v. French, 2 Show. 28; Young v. —, 1 Ld. Raym. 725; Taylor v. Whitehead, 2 Doug. 745; Bullard v. Harrison, 4 Maule & S. 387, 393.)

Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff, in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of Taylor v. Whitehead, *ubi supra*, which he says "is the latest on the point, and settles the law." 3 Dane, Abr. 258. And so Chancellor Kent states the rule. 3 Kent, Comm. 324. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country, but there are several decisions in New York in which the rule has been incidentally recognized and treated as well-settled law. Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is that it has always been practiced upon and acquiesced in, without objection, throughout the New England states. This accounts satisfactorily for the absence of any adju-

dication upon the question in our courts, and is a sufficient answer to the objection upon this ground which was urged upon us by the learned counsel for the plaintiff. When a right has long been claimed and exercised without denial or objection, a strong presumption is raised that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine that to justify or excuse an alleged trespass inevitable necessity or accident must be shown. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity to do so. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea-coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases the only escape is by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service and for the use and benefit of the whole community, a due regard for the welfare of all requires that, when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law that, where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person traveling on a highway is in the exercise of a public, and not a private, right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the ex-

ercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attach to a highway through private property, it must be assumed that the right to the use of land adjoining the road was taken into consideration, and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed for the private injury which might thereby be occasioned.

It was also suggested that the statutes of the commonwealth imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable,—of obstructions occasioned by sudden and recent causes, which have not existed for the space of 24 hours, and

of which the towns have had no notice. Besides, the statute liability of towns does not extend to damages such as would ordinarily arise from a total obstruction of a highway, being expressly confined to cases of bodily injuries and damages to property. St. 1850, c. 5; Canning v. Williamstown, 1 Cush. 451; Harwood v. Lowell, 4 Cush. 310; Brailey v. Southborough, 6 Cush. 141.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity,—*cessante ratione cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when by the exercise of due care, after notice of obstructions, other ways may be selected, and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes, which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveler. In the case at bar this question was wholly withdrawn from the consideration of the jury by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas. Exceptions sustained.

(See, also, *Morey v. Fitzgerald*, 56 Vt. 487; *Carey v. Rae*, 58 Cal. 159.)

(5 Johns. 352.)

WILLIAMS v. SPENCER.

(*Supreme Court of New York*. Feb. Term, 1810.)

TRESPASS TO LAND — BREAKING OPEN DOOR TO SERVE PROCESS.

The owner of a house, renting the same, reserved an inner room, which he occupied. A constable, having a warrant against him, entered by the outer door, which was open, and broke open the door of such inner room and arrested him. *Held*, that the constable was not a trespasser.

In error, on *certiorari*.

Action of trespass *quare clausum fregit* brought by Spencer against Williams. It appeared at the trial before a justice of the peace that Spencer let out part of his house, and reserved an inner room for

himself, which he occupied; that Williams, who was a constable, having a warrant against Spencer, the outer door of the house being open, broke open the door of the inner room, and arrested him. The justice gave judgment for plaintiff, and defendant brought up the case by *certiorari* and writ of error.

Mr. Tomlinson, for plaintiff in error. *Mr. Foot*, for defendant in error.

PER CURIAM. There was no protection, in this case, to the door of the inner room, though occupied separately by the defendant in error. The constable had a right, therefore, to break the door. *Lee v. Gansel*, Cowp. 1.

The judgment must be reversed.

(See, also, *Hubbard v. Mace*, 17 Johns. 127; *Hager v. Danforth*, 20 Barb. 16; *Com. v. Tobin*, 108 M ss. 426.)

(10 Q. B. Div. 17.)

TILLET V. WARD.

(Court of Queen's Bench. Nov. 27, 1882.)

TRESPASS TO LAND—CATTLE ESCAPING FROM HIGHWAY.

Defendant's ox, while being driven along the highway in a town, without any negligence on defendant's part, escaped from him, and entered plaintiff's adjoining premises through an open door. *Held*, that an action would not lie for plaintiff's damages.

Appeal by special case from the decision of the judge of the county court of Lincolnshire, holden at Stamford.

Action for injuries to goods in plaintiff's shop, caused by defendant's ox, which came through the open doorway after escaping from defendant's servants, who were driving it along the public street in Stamford in the usual and customary manner. There was no evidence of negligence of defendant's servants, or that the ox was vicious, or that there was anything exceptional in its temper and character. The county court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

Moon & Graham, for defendant. *Mr. Sills*, for plaintiff.

COLERIDGE, C. J. In this action the county court judge has found as a fact that there was no negligence on the part of the drivers of the ox, or, at all events, he has not found that there was negligence; and, as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear, as a general rule, that the owner of cattle and sheep is bound to keep them from trespassing on his neighbor's land, and, if they so trespass, an action for damages may be brought against him, irrespective of whether the trespass was or was not the result of his negligence. It is also tolerably clear that where both parties are upon the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, show that the trespass was owing to the negligence of the other or of his servant. It is also clear that, where a man is injured by a fierce or vicious animal belonging to another, *prima facie* no action can be brought without proof that the owner of the animal knew of its mischievous tendencies. In the present case, the trespass, if there was any, was committed off the highway upon the plaintiff's close, which immediately adjoined the highway, by an animal belonging to the defendant, which was being driven on the highway. No

negligence is proved, and it would seem to follow, from the law which I have previously stated, that the defendant is not responsible. We find it established, as an exception upon the general law of trespass, that, where cattle trespass upon unfenced land immediately adjoining a highway, the owner of the land must bear the loss. This is shown by the judgment of BRAMWELL, B., in *Goodwyn v. Cheveley*, 28 Law J. Exch. 298. That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of BLACKBURN, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 265, that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities; but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shown, and the judgment of the county court judge must be reversed.

STEPHEN, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbors; but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn v. Cheveley*, 28 Law J. Exch. 298, seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway,—an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn v. Cheveley* a very reasonable one, for otherwise I cannot see how we could limit the liability of the owner of cattle for any sort of injury which could be traced to them.

Judgment for defendant.

(See, also, *Hartford v. Brady*, 114 Mass. 466; *Cool v. Crommet*, 13 Me. 250; *Bush v. Brainard*, 1 Cow. 78, and note.)

(37 N. H. 331.)

LAWRENCE v. COMBS.

(Supreme Judicial Court of New Hampshire.
July Term, 1858.)

TRESPASS TO LAND—ADJOINING TENANTS—OBLIGATION TO FENCE.

Trespass will not lie by the tenant of a close against an adjoining proprietor for damage done by cattle of a third person, which, straying upon the highway, enter defendant's lands, and from there pass upon plaintiff's land, through a defect in that portion of the division fence which defendant was by law bound to keep in repair. Rev. St. N. H. c. 136 § 1.

On report of referee.

Action on the case for negligence. It appeared on trial before a referee that cattle of a third person straying on the highway entered upon defendant's land, and therefrom passed upon plaintiff's adjoining land through a defective fence at a point where defendant was by law bound to build and keep in repair the division fence. The referee reported the facts for the judgment of the court.

Wheeler & Faulkner, for plaintiff. *Mr. Lane*, for defendant.

EASTMAN, J. At common law, a tenant or owner was not obliged to fence against an adjoining owner or occupier, except by prescription, but he was to keep his cattle on his own land at his peril; and, if they escaped, they might be taken on whatever land they were found damage feasant, or the owner was liable to an action of trespass by the party injured. And where there was no prescription, but the tenant had made an agreement to fence, he could not be compelled to carry out his agreement and make the fence; and the party injured by the breach of the agreement had no remedy but by an action on the agreement. Nowel v. Smith, Cro. Eliz. 709; Rust v. Low, 6 Mass. 94; Avery v. Maxwell, 4 N. H. 36; Deyo v. Stewart, 4 Denio, 101; 3 Kent. Comm. 438; Dean v. Railroad, 2 Fost. (N. H.) 317; Glidden v. Towle, 11 Fost. (N. H.) 168.

In case of a prescription to fence, the tenant could be compelled to fence by the writ of *curia claudenda*, sued out by the tenant of the adjoining close, who could also recover damages by that writ. Fitzh. Nat. Brev. "Curia Claudenda," 297; Rust v. Low, 6 Mass. 94; Glidden v. Towle, 11 Fost. (N. H.) 168. But, by statute, the owners of adjoining lands, under improvement, are required to make and repair the partition fences between them. Rev. St. c. 136, § 1. And after the fence has been divided, the owner of a close can sustain no action for damages done by horses or cattle breaking into his close, through defects in the fence which he was bound to make and repair, if they were rightfully on the adjoining land. Avery v. Maxwell, 4 N. H. 36; York v. Davis, 11 N. H. 241; Page v. Olcott, 13 N. H. 399. Where there are adjoining closes, with an undivided partition fence, which each owner is bound to keep in repair, each is required to keep his cattle on his own land at his peril. Tewksbury v. Bucklin, 7 N. H. 518; Avery v. Maxwell, 4 N. H. 36; Thayer v. Ar-

nold, 4 Metc. (Mass.) 589; Little v. Lathrop, 5 Greenl. 356.

At common law the tenant of a close who was obliged by prescription to fence was not required to do it against any cattle except those which were rightfully in the adjoining close. Salkwell v. Milwarde, 26 Hen. VI. c. 23; 10 Edw. IV. c. 7; Fitzh. Nat. Brev. "Curia Claudenda," 1, 2; Rust v. Low, 6 Mass. 99, 100; 3 Kent, Comm. 438. And the same rule has been held to prevail where statutes have been adopted regulating the rights and duties of adjoining owners in regard to fences. In Rust v. Low, already cited, which is a leading American case upon the question, the point was distinctly decided that the tenant of a close is not obliged to fence except against cattle which are rightfully upon the adjoining land. In Avery v. Maxwell, 4 N. H. 37, Chief Justice Richardson says that "it is well settled that the owner of a close is only bound to fence against creatures which are rightfully on the adjoining land." And in Holladay v. Marsh, 3 Wend. 147, Chief Justice SAVAGE also says that "it is certainly well settled that a man is not obliged to fence against any cattle but such as may be rightfully upon the adjoining close." This doctrine is sustained by many authorities, among which may be cited Wells v. Howell, 19 Johns. 385; Stackpole v. Healy, 16 Mass. 38; Lord v. Wormwood, 29 Me. 282; Hurd v. Railroad Co., 25 Vt. 122; Dovaston v. Payne, 2 H. Bl. 527; Cornwall v. Railroad, 8 Fost. (N. H.) 167.

From the declaration of the plaintiff, it appears that he and the defendant were owners of adjoining closes; that the fence between them had been divided; and that the defendant's portion of the fence was out of repair. Upon this state of facts, and according to the principles stated, there can be no doubt that the defendant would be liable, had the cattle that committed the trespass upon the plaintiff's land been rightfully in the close of the defendant, for they went into the plaintiff's close over that part of the fence which the defendant was bound to maintain. But the cattle that committed the trespass were not the property of the defendant, nor were they upon his land by his permission; but they belonged to third persons, and strayed from the highway—where they do not appear to have been for any legitimate purpose—into the defendant's close, and thence came upon the plaintiff's land and did the damage. Both the plaintiff and defendant could maintain their actions against the owners of the cattle for the trespasses committed; for, not being rightfully in the highway, it is immaterial what the situation of their fences were. They were not obliged to fence against wrong-doers. The authorities cited settled this position.

[The opinion concludes with an examination of the provisions of the New Hampshire statute as to division fences, (Rev. St. c. 136,) which, however, it is held, do not change the result.]

Our conclusion is that there should be, Judgment on the report for the defendant.

(See, also, Railroad Co. v. Munger, 5 Denio, 255; Thayer v. Arnold, 4 Metc. (Mass.) 559; Knox v. Tucker, 48 Me. 373; Scott v. Grover, 56 Vt. 499.)

NUISANCE.

I. WHAT CONSTITUTES A NUISANCE—PRESCRIPTIVE RIGHT TO MAINTAIN A NUISANCE—INJUNCTION TO RESTRAIN.

(63 N. Y. 563.)

CAMPBELL *et al.* v. SEAMAN.

(*Court of Appeals of New York.* Jan. 21, 1876.)

1. NUISANCE—WHAT CONSTITUTES.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.

2. SAME—BRICK-BURNING.

The burning of brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brick-burning is a useful and necessary industry.

3. INJUNCTION—WHEN GRANTED.

The writ of injunction is not a matter of grace, but of right, in a proper case, and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.

4. SAME.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brick-kiln is such irreparable injury as a court of equity will enjoin.

5. NUISANCE—PRESCRIPTIVE RIGHT TO MAINTAIN.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription.

6. SAME.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick-kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln.

Appeal from supreme court, general term, third department.

Action by Samuel B. Campbell and others against Nathan N. Seaman to recover damages from an alleged nuisance and to restrain the continuance thereof. The nuisance consisted in the burning of brick by anthracite coal on defendant's premises, which killed the foliage, trees, and shrubbery on plaintiffs' adjoining premises. The referee by whom the case was tried found for plaintiffs, and the general term affirmed the judgment entered upon his report. From the judgment of the general term defendant appealed.

Geo. W. Miller and W. S. Hevenor, for appellant. *G. P. Jenks*, for respondents.

EARL, J. The plaintiffs owned about 40 acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858, and 1859 they built upon it an expensive dwelling-house; and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful. The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is

southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape-vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at \$500. This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non lædas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city, he must expect to suffer the dirt, smoke, noisome odors, noise, and confusion incident to city life. As Lord Justice JAMES beautifully said, in *Salvin v. Coal Co.*, L. R. 9 Ch. App. 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property, so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be

defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality, and under some circumstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick-burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite mainly those where the precise question was involved in reference to brick-burning.

The earliest case is that of *Duke of Grafton v. Hilliard*, decided in 1736, not reported, but referred to in *Attorney General v. Cleaver*, 18 Ves. 211. Chancellor ELDON there says that the court held in that case that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." By looking at that case, as found in a note to *Walter v. Selfe*, 4 Eng. Law & Eq. 18, it will be seen that no such decision was made in that case, and that no such language was used therein. A temporary injunction had been granted in the first instance, restraining brick-burning, but it was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff.

In *Donald v. Humphrey*, 14 F. (Sc.) 1206, the plaintiff brought an action to restrain brick-burning, and insisted that the business was *per se* a nuisance, and should be restrained without proof of actual injury, but the court held that the business of burning brick was a lawful business, and not *per se* a nuisance, but that the question as to whether it was a nuisance or not was one of fact, to be determined by the circumstances of each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

In the case of *Walter v. Selfe*, supra, the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs, or injury or damage to the buildings thereon standing, or shrubberies or plantation, named in the bill.

In *Pollock v. Lester*, 11 Hare, 266, the defendant was making preparations to burn bricks near a lunatic asylum of which plaintiff was proprietor, and plaintiff brought his bill praying an injunction to restrain the defendant, alleging in his bill that the smoke and vapor arising from the brick-burning would be injurious to his patients, and cause them to leave his asylum, and would also injure the trees, shrubs, and plants thereon growing; and the injunction was granted. This was done, it will be seen, merely upon the apprehension of damage, and before any was actually suffered.

After the decision of this case, *Hole v. Barlow*, 4 C. B. (N. S.) 336, was decided.

That was an action for a nuisance arising from the burning of bricks on defendant's own land near to the plaintiff's dwelling-house, and the judge at the trial told the jury that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being carried on, and he left two questions to the jury—*First*, "Was the place in which the bricks were burned a proper and convenient place for the purpose?" *secondly*, if they thought the place was not a proper place for the purpose, then "was the nuisance such as to make the enjoyment of life and property uncomfortable?" It was held that there was no misdirection. That case, which was in conflict with prior authorities, has since been overruled in *Beardmore v. Tredwell*, 31 Law J. Ch. 892; *Bamford v. Turnley*, 31 Law J. Q. B. 286; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Bareham v. Hall*, 22 Law T. (N. S.) 116; *Roberts v. Clarke*, 18 Law T. (N. S.) 49; *Luscombe v. Steer*, 17 Law T. (N. S.) 229.

In *Beardmore v. Tredwell* the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, although the bricks were to be used in the erection of government fortifications. Vice-Chancellor STUART says: "Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to the plaintiff; that the comfort and enjoyment of his mansion-house are injured; that the trees planted and standing and growing for ornament have been, in some cases, entirely destroyed, and in many cases injured."

In *Bamford v. Turnley*, *COCKBURN*, C. J., before whom the case was tried, followed *Hole v. Barlow*, and charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict. The jury found for the defendant, but upon the hearing in the exchequer chamber it was held that the instructions were erroneous, and that it was no answer, in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property, that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, nor that the same business had been carried on in the same locality for 17 years. The doctrine of *Hole v. Barlow* was distinctly repudiated, and that case was in terms overruled.

In *Cavey v. Ledbitter*, an action for a nuisance caused by brick-burning, the judge at the trial left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit-trees had been thereby injured; and he refused to ask them whether the bricks had been burned in a convenient place, and it was held that there was no misdirection.

In *Bareham v. Hall* a bill was filed for an

injunction to restrain the defendant from using a brick-kiln in such a way as to be a nuisance to the property of plaintiff, or to plaintiff and his family. There, as here, the damage and annoyance were suffered only when the wind blew from the direction of the kiln; and Vice-Chancellor STUART said "that, *prima facie*, a brick-kiln built within 100 yards in front of a mansion-house would be a nuisance, unless the process used for burning the bricks was one of an unusual kind."

Roberts v. Clarke was a bill for an injunction restraining the defendant from burning brick on his premises to the injury of plaintiff's premises, and the vice-chancellor held that brick-burning carried on in the ordinary way was a nuisance to persons living within the limits affected by it, and that 240 yards was no extreme limit for the smoke and vapor to extend, and that it was such a nuisance as the court would restrain.

In *Luscombe v. Steer* the defendant rented premises, and began to burn brick within 1,442 feet of the plaintiff's house, on premises adjoining. At the time when the bill was brought no actual injury had been sustained by the plaintiff, but the bill was predicated upon a prospective nuisance. The court denied an injunction upon the grounds that, no actual injury having been sustained, no nuisance existed; and that no evidence having been given to establish the fact of prospective nuisance, it was not a case for equitable relief. But the court said: "If the business should hereafter become a nuisance to the plaintiff, he can then apply to the court for relief, and his rights will be protected."

In this country, so far as I can ascertain, the question of nuisance from brick-burning has rarely been before the courts. The only case to which our attention has been called is *Huckenstine's Appeal*, 70 Pa. St. 102. In that case AGNEW, J., says: "Brick-making is a useful and necessary employment, and must be pursued near to towns and cities where bricks are chiefly used. Brick-burning, an essential part of the business, is not a nuisance *per se*. Attorney General v. Cleaver, 18 Ves. 219. It, as many useful employments do, may produce some discomfort, and even some injury, to those near by, but it does not follow that a chancellor would enjoin therefor." He then goes on to say that the aid of an injunction is not matter of right, but of grace; and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue, and that the plaintiff should be left to his remedy at law. In the following analogous cases, useful industries, which produced smoke or noxious gases or vapors or odors, were declared nuisances: *Catlin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. 129; *Taylor v. People*, 6 Parker, Crim. R. 352; *Davis v. Lamberton*, 56 Barb. 480; *Hutchins v. Smith*, 63 Barb. 251; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 24; *Rex v. White*, 1 Burrows,

337; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Sampson v. Smith*, 8 Sim. 272; *Tipping v. Smelting Co.*, 4 Best & S. 608; *Crump v. Lambert*, L. R. 3 Eq. 409; *Pointer v. Gill*, 2 Rolle, Abr. 140.

Without further citation of authority, I think it may safely be said that no definition of nuisance can be found in any text-book or reported decision which will not embrace this case.

But the claim is made that, although the brick-burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined. Prior to Lord ELDON'S time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and, with the development of equity jurisprudence which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the states, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense, except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Nail Factory*, 40 N. Y. 191; *Reid v. Gifford*, *Hopk. Ch.* 416; *Pollitt v. Long*, 58 Barb. 20; *Railroad Co. v. Archer*, 6 Paige, 83; *Parker v. Woollen Co.*, 2 Black, 545, 551; *Webber v. Gage*, 39 N. H. 182; *Dent v. Auction Mart Co.*, 35 Law J. Ch. 555; *Attorney General v. Telegraph Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165, *Flowers v. Potteries Co.*, L. R. 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial, and, within the principle laid down in the cases above cited, and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion, and had laid out their grounds, and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself

only with articles of necessity. The law will protect a flower or a vine as well as an oak. *Cooke v. Forbes*, L. R. 5 Eq. 166; *Broadbent v. Gas Co.*, 7 De Gex, M. & G. 436. These damages are irreparable, too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained, the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by, the termination of such litigation by a single suit. The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. *Ross v. Butler*, 19 N. J. Eq. 294; *Meigs v. Lister*, 23 N. J. Eq. 200; *Clowes v. Potteries Co.*, supra; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259. It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. *Taylor v. People*, supra; *Wier's Appeal*, 74 Pa. St. 230; *Brady v. Weeks*, 3 Barb. 157; *Barwell v. Brooks*, 1 Law T. 454. One cannot erect a nuisance upon his land adjoining vacant lands owned by another, and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land, and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of 20 years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they bought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant. From about 1840 to 1853 no bricks were burned there. Then, from 1853 to 1857, bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick-yard was plowed and used for agricultural purposes. Before suit brought plaintiffs objected to the brick-burning. No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and therefore

there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case. It is true that if a party sleeps on his rights, and allows a nuisance to go on without remonstrance, or without taking measures, either by suit at law or in equity, to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case. *Radenhurst v. Coate*, 6 Grant, Ch. 140; *Heenan v. Dewar*, 18 Grant, Ch. 438; *Bankart v. Houghton*, 27 Beav. 425. The defendant claims a prescriptive right to burn bricks upon his land, and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire, by lapse of time and continuous user, the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for 20 consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick-burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for 20 years, and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for 20 years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks, and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer, nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over 25 years. This is not finding that they have been used as a brick-yard for 25 years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously. *Ball v. Ray*, L. R. 8 Ch. App. 467; *Parker v. Mitchell*, 11 Adol. & E. 788; *Battishill v. Reed*, 18 C. B. (N. S.) 696; *Fish Co. v. Dudley*, 37 Conn. 136. Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case. Here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick may exist in all parts of our state, and particularly at various points along the Hudson river. An injunction need not, therefore, destroy defendant's business, or interfere materially with the useful and necessary trade of brick-making. It does not appear how valuable defendant's land is for a brick-yard, nor how expensive are his erections for brick-making. I think we may infer

that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abatement of the nuisance will be as great as plaintiffs' damage from its continuance. Hence this is not a case within any authority to which our attention has been called where an injunction should be denied on account of the serious consequences to the defendant. We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick-making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly-settled community.

Defendant complains that the damage allowed by the referee was too great. He had the evidence and all the circumstances before him, and we cannot review his decision upon the amount of damage. It is also complained that the injunction contained in the judgment as entered is broader and more unlimited than that ordered by the referee. This is a matter not to be corrected upon appeal. Defendant should have compelled an entry of judgment in accordance with the decision of the referee. If plaintiffs entered a judgment not authorized by the referee's report, defendant should have moved to set it aside or to correct it.

One of the three judges who heard the appeal in the general term of the supreme court died before the decision was made, and the appeal was decided by the remaining two judges, and this appeal is from the judgment entered upon that decision. It is now objected that the two judges could not make a decision. Even if the defendant, after he has appealed from the judgment, can raise the objection, we are of opinion that the objection is not well founded, and that two judges can hold a general term, and decide cases argued there. *Van Rensselaer v. Witbeck*, 2 Lans. 499. It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

(11 H. L. Cas. *642.)

ST. HELEN'S SMELTING CO. v. TIPPING.

(House of Lords. July 5, 1865.)

NUISANCE — WHAT CONSTITUTES — VAPORS FROM USEFUL INDUSTRIES.

In an action to recover for a nuisance caused by vapors arising from the operation of defendant's smelting works on adjoining premises, the court charged the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so; that the law does not regard trifling inconveniences; that everything must be looked at from a reasonable

point of view; and, therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; that, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that, in countries where great works have been erected and carried on which are the means of developing the natural wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in these places. The court refused to hold that the questions which ought to be submitted to the jury were "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." *Held*, not erroneous.

Appeal from exchequer chamber.

Action by William Tipping against the St. Helen's Copper Smelting Company, Limited, for a nuisance to plaintiff's dwelling-house and premises caused by noxious vapors proceeding from smelting works owned and operated by defendant on adjoining lands, which destroyed plaintiff's trees and foliage, injured his cattle, and were detrimental to his health. At the trial in the court of queen's bench, before MELLOR, J., defendant's counsel contended that the three questions which ought to be submitted to the jury were "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The court refused so to hold, but charged the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so; that the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; that, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that, in countries where great works have been erected and carried on which are the means of developing the natural wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. The jury found specially that the enjoyment of plaintiff's property was sensibly diminished; that the business carried on by defendant was the ordinary business of smelting copper, and conducted in a proper manner, in as good a manner as possible; and that it was carried on in a proper place; and found a verdict for plaintiff for £361 damages. Defendant moved for a new trial, which was refused. 4 Best & S. 608. The judgment of the queen's bench was affirmed by the exchequer chamber, and from that judgment defendant appealed.

The Attorney General (Sir R. Palmer) and Mr. Webster, for appellant. *Mr. Brett*,

Mr. Mellish, and Mr. Milward, for respondent.

MARTIN, B. In answer to the questions proposed by your lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury are correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last 20 years.

THE LORD CHANCELLOR. My lords, I think your lordships will be satisfied with the answer we have received from the learned judges to the question put by this house. My lords, in matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance upon the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal convenience, an interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a "nuisance," must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that, in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property. Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began

on the property of the present appellant,—the works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to the trees and shrubs, there is abundance of evidence in the case. My lords, the action has been brought upon that; the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set aside that verdict, and to direct a new trial, is this: That the whole neighborhood where these copper smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes, of a similar kind, and therefore it is said that, inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction or the very considerable diminution of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence,—that a trade may be carried on in a particular locality, the consequence of which trade may be the injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place. On these grounds, therefore, shortly, without dilating further upon them, (and they are sufficiently unfolded by the judgment of the learned judges in the court below,) I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal, with costs.

LORD CRANWORTH. My lords, I entirely concur in opinion with my noble and learned friend on the wool-sack, and also in the opinion expressed by the learned judges that this has been considered to be the proper mode of directing a jury, as Mr. Baron MARTIN said, for at least 20 years. I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice MELLOR. He says: "It must be plain that persons using a lime-kiln or other works, which emit noxious vapors, may not do an actionable injury to another; and that any place, where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property. I perfectly well remember, when I had the honor of being one of the barons of the court of exchequer, try-

ing a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfere with a certain person, but I said: "You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that an actionable nuisance. There is nothing of that sort in the present case. It seems to me that the distinction, in matter of fact, was most correctly pointed out by Mr. Justice MELLOB, and I do not think he could possibly have stated the law, either abstractedly, or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My lords, I entirely agree in opinion with both my noble

and learned friends in this case. In these few sentences I think everything is included: The defendants say, "If you do not mind, you will stop the progress of works of this description." I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, "I will bring an action against you for this and that and so on." Business could not go on if that were so. Everything must be looked to from a reasonable point of view. Therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences,—injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected. My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Appeal dismissed, with costs.

(See, also, McCaffrey's Appeal, 105 Pa. St. 253; Demarest v. Hardham, 34 N. J. Eq. 469; Wier's Appeal, 74 Pa. St. 220; Davis v. Sawyer, 133 Mass. 289; Bohan v. Gas-Light Co., 122 N. Y. 18, 25 N. E. Rep. 246; People v. Lead-Works, 82 Mich. 471, 46 N. W. Rep. 735; Com. v. Miller, 139 Pa. St. 77, 21 Atl. Rep. 135.)

II. EXAMPLES OF NUISANCES.

1. Drainage of surface waters.

(86 N. Y. 140.)

BARKLEY v. WILCOX.

(Court of Appeals of New York. Oct. 4, 1881.)

SURFACE WATERS—OBSTRUCTING.

The owner of land, which is so situated that the surface waters from the land above naturally descend upon and pass over it, may in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.

Appeal from supreme court, general term, second department.

Action by Alfred Barkley against Nelson Wilcox to recover damages for injuries alleged to have been sustained by the obstruction of the natural flow of surface water from plaintiff's lot over and across that of defendant. The case was submitted to a referee, who reported in favor of defendant, and the judgment entered thereon was affirmed by the general term. 19 Hun, 320. From the judgment of the general term plaintiff appealed.

C. E. Cuddeback, for appellant. J. M. Allerton, for respondent.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course because, in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of

running water. Ang. Water-Courses, § 4; Luther v. Winnisimmet Co., 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are that the natural formation of the land was such that surface water from rains and melting snows would descend from different directions and accumulate in the street in front of the plaintiff's lot, in varying quantities, according to the nature of these seasons, sometimes extending quite far back upon plaintiff's lot; that in time of unusual amount of rain or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land, across the defendant's lot, and thence over the lands of others, to the Neversink river; that, when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot, and sidewalk in front of it, about 12 inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural water-course over

the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant or usual, but occasional only. There was no "channel" or "stream," in the usual sense of those terms. In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this state. It was referred to by DEXIO, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And, in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of the land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. Mayor, etc.*, 76 N. Y. 60. The question has been considered by courts in other states, and has been decided in different ways. In some the doctrine of the civil law has been adopted as a rule of decision. By that law, the right of drainage of surface water, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. *Corp. Jur. Civ.* 39, tit. 3, §§ 2-5; *Domat*, (Cush. Ed.) 616; *Code Nap. art. 640*; *Code La. art. 656*. The courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Pa. St. 415; *Kauffman v. Griesemer*, Id. 407; *Gillham v. Railroad Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Ogburn v. Connor*, 46 Cal. 316; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays*

v. Hays, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not, by the common law, apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Bowlsby v. Speer*, 31 N. J. Law, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Wis. 656; *Swett v. Cutts*, 50 N. H. 439. It may be observed that in Pennsylvania house-lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that state in respect to surface drainage. *Bentz v. Armstrong*, 8 Watts & S. 40. And in *Livingston v. McDonald*, 21 Iowa, 160, the court, in an opinion by DILLON, J., after stating the civil-law doctrine, say that it may be doubted whether it will be adopted by the common-law courts of this country, so far as to preclude the lower owner from making, in good faith, improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if, for the purposes of improving and cultivating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed onto the first-mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. *Washb. Easem.* (2d Ed.) 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view, on the one hand, individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by DEXIO, C. J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy; while, at the same time, it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which

flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water, as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert, or unreasonably obstruct, the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which in civilized society the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by an individual of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between coterminal proprietors, in determining the right of mere surface drainage. But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land and his right in the water of a natural water-course. In such water, before it leaves his land and becomes a part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it, by drains or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So, also, he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Acton v. Blundell*, 12 Mees. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N. Y. 39. Now, in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is that the owner of land has full dominion over what is above, upon, or below the surface,

and the owner, in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by draining or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor, to his injury. This is alike the rule of the civil and common law. *Corp. Jur. Civ.* 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Pa. St. 154. But it does not follow, we think, that the owner of land which is so situated that the surface water from the lands above naturally descends upon and passes over it may not, in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed, in respect to surface drainage, would, we think, place undue restriction upon industry and enterprise, and the control of an owner of his property. Of course, in some cases, the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice?

For the reasons stated, we think the rule of the civil law should not be adopted in this state. The case before us is an illustration of the impolicy of following it. Several house-lots (substantially village lots) are crossed by the depression. They must remain unimproved if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed. All concur.

Judgment affirmed.

(See, also, *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. Rep. 350; *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. Rep. 595; *Peck v. Herrington*, 109 Ill. 611; *Bowlsby v. Spear*, 31 N. J. Law, 351; *Rathke v. Gardner*, 134 Mass. 14; *Rindge v. Sargent*, 64 N. H. 294, 9 Atl. Rep. 723.)

2. Diversion and detention of stream.

(46 N. Y. 511.)

CLINTON V. MYERS.

(*Court of Appeals of New York*. Nov. 23, 1871.)

1. WATER-COURSES—DETENTION OF STREAM.

As against a lower riparian owner, a person has no legal right to detain, by means of a stor-

age dam erected upon his land, such surplus waters of a natural water-course crossing his lands as he may not require for present use until they may be wanted by him in a dry season.

2. SAME—INJUNCTION.

The fact that such storage makes the lower riparian owner's rights more valuable is immate-

rial if he insists upon his legal right to the water as it would naturally flow, and such right is of any value to him. Nor will a court of equity inquire as to his motive in insisting on his legal rights.

Appeal from supreme court, general term, sixth judicial district.

Action by William M. Clinton against Charles P. Myers to restrain defendant from opening the gate of plaintiff's dam, and letting off the accumulated waters. Plaintiff owned the land forming the boundaries of a natural pond and its outlet. The pond was formed by springs and by surface waters running therein in rainy seasons and from melting snows. Plaintiff owned a cotton factory some three miles below this pond, which was run most of the year by water from other sources, and he constructed a dam across the outlet of the pond to store the waters for use in the dry seasons when his other supply was inadequate to run his mill. Defendant owned a large farm between the pond and plaintiff's factory, lying upon both sides of the stream from the pond, upon which stream he had a water-power and saw-mill. This action was brought to restrain the threatened interference with the gates of plaintiff's dam to let off the waters of the pond. The court awarded an injunction. Defendant appealed.

H. Sturges, for appellant. *L. J. Burditt*, for respondent.

GROVER, J. The judgment restraining the defendant from interfering with the gate and other structures of the plaintiff at the outlet of the pond can be sustained only in case the plaintiff has the right to maintain the dam and other structures, and thereby control the flow of the water in the manner and for the purposes found by the special term for which it was controlled by him; and for effecting which, the structures were erected. From these facts it appears that the dam and structures were erected at the outlet of a natural pond of about 40 acres, into which one or more small streams run, having but a small quantity of water in a dry time flowing therein, but in the wet seasons—spring and fall—a much larger quantity flowed into and out of the pond. That the dam was constructed about 10 feet above the natural outlet of the pond, and used to detain the water in the pond during such portions of the year as the plaintiff's factory was adequately supplied with water from a stream below the dam, (the latter stream originating from another source,) and when this failed to furnish an adequate supply the deficiency was supplied from the reservoir, in a steady and constant manner, through a gate in a trunk of about a foot square. That the waters have been retained and used by the plaintiff with the sole view of economizing and utilizing the same to the greatest possible extent; not viciously, or with any intent to injure or in any way wrong the defendant. It further appears from such finding that the water was so detained by the plaintiff during the wet seasons in the spring and fall, until wanted for use by the plaintiff in the dry seasons of winter and summer. The judgment, in effect, de-

termines that the plaintiff has a right so to detain and use the water, it being necessary so to do, to give an adequate and profitable power to propel the machinery of a factory owned by him, situate about three miles below the outlet, as against the defendant. The defendant is the owner of a parcel of land situated upon both sides of the stream between the outlet and the plaintiff's factory, upon which there is a saw-mill operated by the defendant during portions of the year. The question to be determined is of great importance to the plaintiff, the ease showing that his factory is of great value, which will be much impaired, if not wholly destroyed, by not enjoying the right to control and use the water in the manner claimed by him in this action. While this consideration should induce care in the examination of the case, it can have no weight in the determination of the legal rights of the parties. It is the duty of the court to apply the law as it is to the facts of every case, and give to every party his legal rights, irrespective of any hardship that may be thereby caused in any special case. It is necessary to examine the question as to the rights of riparian owners, as the judgment for the plaintiff, to its full extent, depends wholly upon those rights.

Kent (3 Comm. 439) says that every proprietor of lands on the banks of a river has naturally an equal right to the use of water which flows in the stream adjacent to his lands, as it was wont to run, (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "*Aqua currit et debet currere ut currere solebat*," is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. In *Tyler v. Wilkinson*, 4 Mason, 397, Judge STORY, after a thorough examination of the authorities, says that every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank to the middle thread of the stream, etc. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of a river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural

stream existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be and there must be allowed, of that which is common to all, a reasonable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively or sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into extravagant looseness, which would destroy private rights. A water-course begins *ex jure nature*, and, having taken a certain course naturally, cannot be diverted. "*Aqua currit et debet currere ut currere solebat*" is also the language of the ancient common law. That is, the water runs naturally, and should be permitted thus to run, so that all through whose lands it runs may enjoy the privilege of using it. Ang. Water-Courses, § 93. This is sustained by numerous judicial decisions and allelementary writers upon the subject.

How far the natural flow of the stream may be interfered with by a riparian owner, to enable such owner to utilize the stream, for the purpose of propelling machinery, has frequently been the subject of judicial examination. *Gould v. Duck Co.*, 13 Gray, 443, may be regarded as a leading case upon this point. In this case the defendant had built a substantial dam upon the stream, and drew the water to its factory by means of a canal, and, after using the same, returned it to its natural channel before it reached the plaintiff's land. The stream, at ordinary stages of water, afforded an ample supply for the defendant's factory; but in seasons of great drought the defendant was unable to operate its factory during all the usual working hours of each day, but was obliged, in order to create the requisite head and supply of water, to shut its gates earlier than usual on some days, and sometimes for an entire day, and thus arrest the usual flow of the water. This was the injury complained of by the plaintiff, who was the owner of a mill upon the stream directly below the dam, and who was injured, to some extent, by being deprived of the use of the water while the natural flow was thus arrested. The court held that this use of the water by the defendant was not unreasonable, and that, if such use did at times interfere

with the use which the plaintiff might have made of the water, it was "*damnum absque injuria*." The doctrine of this case simply is, that a party has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and, if the stream in seasons of drought becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. I think this is the correct legal rule by which to determine the rights of riparian owners. This will enable each owner to make an advantageous use of the water. The machinery must be such as the power of the stream, in its ordinary stages, is adequate to propel. The water in times of drought may be detained for such a length of time only as is necessary to enable it to be advantageously and profitably used upon such machinery. If so used the accumulation will be discharged in quantities not beyond the usual flow of the stream. This will enable every owner in seasons of drought, when unable to use the water at all as then naturally flowing, to operate his machinery to some extent by retaining the water so as to raise a proper head, and such quantity as to enable him to use the same. By so doing, he is not liable to an action by an owner below, whose machinery does not require for its operation all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent injured by being deprived of the natural flow. But the machinery must be adapted to the power of the stream at its usual stage. An owner has no right to erect machinery requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by ponds full, discharging upon those below in unusual quantities, by means of which the latter are unable to use it. *Merritt v. Brinkerhoff*, 17 Johns. 306. In *Pitts v. Lancaster Mills*, 13 Mete. (Mass.) 156, it was held that an owner had a right to construct a dam and detain the water long enough to raise a head by filling it, permitting it then to resume its natural flow. In *Brace v. Yale*, 10 Allen, 441, it was held that the erection of a reservoir dam upon a small stream, thereby detaining and storing up the water until the owner of the dam desired to use it, and drawing from the pond and using it when he had occasion, was a user of the stream adverse to the rights of the owners below, and, if continued for a sufficient length of time, refined into a right. This, in effect, is an adjudication that an owner has not a right to create a reservoir and store the water therein for future use, and that by so doing he violates the rights of the owners below, for the preservation of which the law will afford a remedy.

The plaintiff cites *Hoy v. Sterrett*, 2 Watts, 327; *Hetrich v. Deachler*, 6 Pa. St. 32; and *Hartzall v. Sill*, 12 Pa. St. 248, —as sustaining the right to store the wa-

ter for future use claimed by the plaintiff. Hetrich v. Deachler simply holds that the reasonableness of the detention of water by the owner above to the injury of the owner below, depending as it must on the nature and size of the stream as well as the business to which it was subservient, was a question of fact for the jury, it being impossible to make any general rule. Hoy v. Sterrett, so far as the questions involved have any bearing upon the present case, is the same as Hetrich v. Deachler. In Hartzall v. Sill, 12 Pa. St. 248, it was held that the proprietor of a mill above had the right to detain the water long enough for the proper use of his mill; and, if by so doing the owner below was injured, it was "*damnum absque injuria*;" and whether longer detained than necessary was a question of fact for the jury. This is an entirely different question from that involved in the present case,—that is, whether, when the stream furnishes more water than is necessary to run a mill, the owner has a right, by means of a reservoir dam, to store up such surplus water and detain it until he shall want it for use in a dry season. Whaler v. Ahl, 29 Pa. St. 98, is in conflict with the law of this state. In this case the defendant had erected machinery that the usual quantity of water in the stream was inadequate to propel. It was held that he might erect a dam, accumulate the water, and with such accumulation run his machinery, discharging the water in unusual quantities upon the owner below. This is in direct conflict with Merritt v. Brinkerhoff, 17 Johns. 320. This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *aqua currit, etc.*, supra.

But it is insisted that this detention does no material injury to the defendant, but that, on the contrary, his power is made more valuable by this use of the water. The answer to this is that he must be the judge whether he will accept of any such benefit. He is entitled to the water

and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer. Again, it is said, and the fact is so found by the special term, that the defendant insists upon his right to the natural flow of the water in the stream from a bad motive, and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to a party his legal right because it disapproves his motives for insisting upon it. The use of the water by the plaintiff, to the extent awarded by the judgment, and protected by the injunction, has not continued 20 years. The plaintiff has acquired no right by prescription. Whether he has any such a right to detain the water by a five-foot dam, as held by the court below, is a grave question upon the evidence; but, as its determination is not necessary, and as the evidence may be different upon another trial, I shall not examine or pass upon it. The counsel for the plaintiff cites from the opinion of Woodruff, J., in Corning v. Nail Factory, 40 N. Y. 220, the proposition that, if it was clear that the restoration of the water was of no value to the plaintiff, the case would not call for equitable interference. Assuming this to be correct, it has no application to the present case. It may be true that equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law. But interfering to restrain him from enforcing such a right on the ground that it is of no value, is quite another affair. That is the present case. That equity will not restrain a party from enforcing his legal right upon any such ground is too clear for discussion. There was nothing in the evidence or finding showing that the defendant was estopped from asserting his right to the natural flow of the water. The judgment appealed from must be reversed, and a new trial ordered; costs to be determined by the court in the decision of the case. All concur, except PECKHAM, J., not voting.

Judgment reversed.

(See, also, Messinger's Appeal, 109 Pa. St. 285, 4 Atl. Rep. 162; Moulton v. Water Co., 187 Mass. 163; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. Rep. 427; Embrey v. Owen, 6 Exch. 353; Davis v. Getchell, 50 Me. 602.)

3. Pollution of stream.

(13 Allen, 16.)

MERRIFIELD v. LOMBARD.

(Supreme Judicial Court of Massachusetts.
Oct. Term, 1866.)

WATER-COURSES—POLLUTION OF STREAM.

The pollution of a stream of water, so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the rights of other riparian owners, and creates a nuisance which will be enjoined at the suit of those injured. Permitting poisonous and corrosive substances to run into the stream, which corrode and destroy the machinery of a lower proprietor, will be enjoined.

Case reserved.

Bill in equity by William T. Merrifield against Nathan A. Lombard for an injunction to restrain defendant from throwing vitriol and other noxious substances in a natural water-course, which so corrupted the water that it corroded, injured, and destroyed plaintiff's engine and boilers used in his factory. The parties were riparian owners on the same stream. Defendant had used the stream for more than 20 years, but the injurious effects of the substances thrown in the stream had not become apparent save in the last 8 years before the suit was brought. At the trial the case was reserved by the judge for the supreme court.

W. Brigham, for plaintiff. *E. B. Stoddard*, for defendant.

BIGELOW, C. J. The case, as made by the bill, answer, and agreed facts, establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural water-course passes that he should use the water in such manner as not to destroy, impair, or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a water-course runs, and creates a nuisance *or which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and prop-

er purposes. *Mason v. Hill*, 2 Nev. & M. 747, 5 Barn. & Adol. 1; *Wood v. Waud*, 13 Jur. 472, 3 Exch. 748; 3 Kent, Comm. (6th Ed.) 439; Ang. Water-Courses, § 136.

It is conceded in the present case that, by the mode in which the defendant conducts his business, a large quantity of poisonous and corrosive substances is permitted to run into the water of the stream on which the plaintiff's and defendant's manufactories are both situated, which defiles and corrupts the water to such an extent that the machinery of the plaintiff is corroded and destroyed, and the use of the water for reasonable and proper purposes is impaired and prevented. We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused, as against a riparian owner of land on the same stream below. No fact appears in this case from which any right by grant, prescription, or adverse use is shown to exist, by virtue of which the defendant can claim to use the stream otherwise than as a riparian owner, entitled to the natural and ordinary rights and privileges which usually and legally attach and belong to the owner of land on the banks of a water-course. It is clear, therefore, that he has been guilty of an infraction of the plaintiff's rights.

The right of the latter to equitable relief is clear and unquestionable. The acts of the defendant tend to create a nuisance of a continuous and constantly accruing nature, for which an action of law can furnish no adequate relief. Ang. Water-Courses, §§ 444-446; *Bemis v. Upham*, 13 Pick. 169; *Hill v. Sayles*, 12 Cush. 454.

Perpetual injunction granted.

(See, also, *Lockwood Co. v. Lawrence*, 77 Me. 297; *Dyeing Co. v. Wanskuck*, 13 R. I. 611; *Wood-year v. Schaefer*, 57 Md. 384; *Carhart v. Gas-Light Co.*, 22 Barb. 297; *Hayes v. Waldron*, 44 N. H. 580; *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335.)

4. Noise.

(146 Mass. 349, 15 N. E. Rep. 768.)

ROGERS v. ELLIOTT

(*Supreme Judicial Court of Massachusetts*.
March 3, 1885.)

NUISANCES — CHURCH BELLS — ACTION FOR DAMAGES.

A person who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.

Exceptions from superior court, Barnstable county; STAPLES, Judge.

Action of tort by Jesse Rogers, Jr., against Thomas P. Elliott, pastor of St. Peter's Roman Catholic Church in Provincetown, to recover damages, the plaintiff alleging that in consequence of the continued ringing of the bell on said church, by the orders of the defendant, the plaintiff was put to great pain and suffering. It appeared at the trial that

plaintiff was lying in bed at his father's house opposite the church, in a thickly settled district, suffering from a sunstroke, and that the ringing of the bell threw him into convulsions; that defendant refused the request of plaintiff's physician not to ring the bell, and insisted on ringing it, saying that he should not stop ringing the bell for anybody, even if he knew a person was sick, and the ringing would kill him. A verdict was directed for defendant, and plaintiff alleged exceptions.

H. M. Knowlton, for plaintiff. *J. J. McDonough*, for defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this prop-

osition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured. It appears that the church was built upon a public street, in a thickly-settled part of the town; and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson v. Iron Co.*, 13 Allen, 95. In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured? In densely populated communities, the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances? If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those on the other, who, by long experience, have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them. That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly, if not quite, as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house,—not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289; *Walter v. Selfe*, 4 De Gex & S. 323; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Smelting Co. v. Tipping*, 11 H. L. Cas. 642. In *Walter v. Selfe*, Vice-Chancellor KNIGHT BRUCE, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary

comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age or state of health." It is said by Lord ROMILLY, master of the rolls, in *Crump v. Lambert*, L. R. 3 Eq. 408, that "the real question in all the cases is the question of fact, viz., whether the nuisance is such as materially to interfere with the ordinary comfort of human existence." In the opinion in *Sparhawk v. Railway Co.*, 54 Pa. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injuries from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence." In the case of *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. Rep. 490, (decided December 9, 1887,) it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible, and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor BRD, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining? * * * A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike." If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it

should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon

considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used. The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far, and under what circumstances, malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

(See, also, *Davis v. Sawyer*, 133 Mass. 289; *Soltan v. De Held*, 2 Sim. (N. S.) 183; *McKeon v. See*, 51 N. Y. 300; *Fish v. Dodge*, 4 Denio, 311.)

5. Keeping dangerous substances.

(80 N. Y. 579.)

HEEG V. LIGHT.

(*Court of Appeals of New York*. April 6, 1880.)

NUISANCE—KEEPING GUNPOWDER.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.

Appeal from supreme court, general term, second department.

Action by Frank Heeg against Philip Licht to recover damages for injuries to plaintiff's buildings alleged to have been caused by the explosion of a powder magazine on defendant's premises, and for an injunction to restrain defendant from manufacturing and storing upon his premises fire-works and other explosive substances. A verdict was rendered for defendant, and the judgment entered thereon was affirmed on appeal to the general term. From the judgment of the general term plaintiff appealed.

Philip S. Crooke, for appellant. *Benjamin F. Downing*, for respondent.

MILLER, J. This action is sought to be maintained upon the ground that the manufacturing and storing of fire-works, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without any apparent cause, exploded, and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant was liable to

the plaintiff, whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous, and not warranted by the facts presented upon the trial. The defendant had erected a building, and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous, and liable to cause damage to the property of persons residing in the vicinity. The locality of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous, and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion, under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling-houses or buildings which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fire-works does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether, from the dangerous character of the defendant's business, the proximity to other

buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Comm. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for damages arising from such use. Wood, Nuis. § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that, while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor, or of his neighbors, even in the pursuit of a lawful trade. Aldred's Case, 9 Coke, 58; Brady v. Weeks, 3 Barb. 159; Dubois v. Budlong, 15 Abb. Pr. 445; Wier's Appeal, 74 Pa. St. 230.

While a class of the reported cases relates to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner, which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughter-houses, fat and offal boiling establishments, hog-styes, or tallow manufactories, in or near a city, which are offensive to the senses, and render the enjoyment of life and property uncomfortable. Catlin v. Valentine, 9 Paige, 575; Brady v. Weeks, 3 Barb. 157; Dubois v. Budlong, 15 Abb. Pr. 445; Rex v. White, 1 Burrows, 337; 2 Bl. Comm. 215; Farrand v. Marshall, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So, also, the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells, (Tipping v. Smelting Co., 4 Best & S. 608; Brill v. Flagler, 23 Wend. 354; Pickard v. Collins, 23 Barb. 444; Wood, Nuis. § 5;) or the burning of a brick-kiln from which gases escape which injure the trees of persons in the neighborhood, (Campbell v. Seaman, 63 N. Y. 568.) Of the latter class, also, are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises, and injure the adjoining dwelling-houses, or the owner or persons there being, or where persons traveling may be injured by such use. Hay v. Cohoes Co., 3 Barb. 42, 2 N. Y. 159; Tremain v. Cohoes Co., 2 N. Y. 163; Pixley v. Clark, 35 N. Y. 523. Most of the cases cited rest upon the maxim, *sic utere tuo*, etc.; and, where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of

others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss, and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *People v. Sands*, 1 Johns. 78, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling-houses, and near a public street; and it was held (SPENCER, J., dissenting) that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and imprudently kept. It will be seen that the case was disposed of upon the form of the indictment, and, while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers v. Malcolm*, 6 Hill, 292, it was held that the act of keeping a large quantity of gunpowder, insufficiently secured, near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. NELSON, C. J., citing *People v. Sands*, supra, says: "Upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that, where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers, it will be regarded as a nuisance. The case of *People v. Sands* is not, therefore, controlling upon the question of negligence. *Fillo v. Jones*, 2 Abb. Dec. 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fire-works may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vi-

cinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder is not controlling, and that the danger arising from the locality where the fire-works or gunpowder are kept is to be taken into consideration in maintaining an action of this

character. We think that the request to charge was too broad, and properly refused. The charge, however, should have been in conformity with the rule herein laid down, and, for the error of the judge in the charge, the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

(See, also, *Wier's Appeal*, 74 Pa. St. 230; *McAndrews v. Collier*, 42 N. J. Law, 189; *Com. v. Kidder*, 107 Mass. 188.)

6. Obstruction of highway.

(18 N. Y. 79.)

CONGREVE v. SMITH *et al.*

(*Court of Appeals of New York*. Sept., 1858.)

1. HIGHWAYS—EXCAVATION UNDER SIDEWALK.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, irrespective of the question of negligence.

2. SAME—INDEPENDENT CONTRACTORS—CONTINUING NUISANCE.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.

Appeal from superior court of New York city, general term.

Action by Congreve against Smith and another for personal injuries caused by the breaking of a flag-stone, over an area in the street in front of defendants' premises, while plaintiff was traveling thereon. The area was built under the sidewalk outside the lot-line in the street proper, and the flag-walk was laid over the same by persons who erected the adjoining building and the area under contract with defendant owners. Defendants sought to escape liability on the ground that the persons who built the area and walk were independent contractors, skillful mechanics, and were required by their contract to build the same in a skillful manner, using the best of materials; but the court charged that defendants were liable in the same manner as their contractors would have been, and the question was whether the stone was such as a prudent and skillful mechanic would have used, to which defendants excepted. The jury rendered a verdict for plaintiff for \$650. The judgment entered thereon was affirmed by the general term. From the judgment of the general term defendants appealed.

Dusenbury & Van Wagoner, for appellants. *Morrison & Browne*, for respondents.

STRONG, J. The verdict of the jury, under the instructions given them by the court, involves the finding that the stone covering the area was unsuitable and unsafe for that purpose, wherefore it broke, and the plaintiff received the injury in ques-

tion. The area was under the surface of the public street, and was maintained for the benefit of the property of the defendants, and the stone was placed over it under contractors with the defendants for the completion of the defendants' building, in pursuance of the contract. No license from the city for the area was proved.

It certainly is just that persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured; and I entertain no doubt that a liability to that extent is imposed on them by law. Such is clearly the legal responsibility for placing objects upon the surface of the ground, obstructing the full and free enjoyment of the easement; and there does not appear to be any distinction in principle as to the liability of a party for an act making the use of the easement dangerous, arising from the mode in which it is done, whether by objects upon or over the surface, which may be run upon or against, or by holes in the earth into which persons may fall. The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation or in him by whom the act complained of was done; in either case, the act of injuring the easement is illegal.

The case of *Dygart v. Schenck*, 23 Wend. 446, appears to be directly in point. In that case it was held that the defendant, who had dug a race-way across a public road, over his own land, to conduct water to his mill, and built a bridge across

it, was liable for an injury sustained in consequence of the bridge being out of repair. The court, by COWEN, J., said that, in suffering the bridge to become unsafe, "the defendant came short of his obligation to the public. Any act of an individual done to the highway, if it detract from the safety of travelers, is a nuisance." And again: "Special damage arising from it, therefore, furnishes ground for private action, without regard to the question of negligence in him who digs it. The utmost care to prevent mischief will not protect him, if the injury happen without gross carelessness on the part of the sufferer."

It is no answer to the present action that the covering of the area was done under the contractors, who had contracted to do the work properly, and that the defendants are not responsible for the negli-

gence of the contractors' servants. The act was that of the defendants. They procured it to be done, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe, compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound, at their peril, to make, and at all times keep, the street as safe as it would have been if the area had not been constructed. The defendants, therefore, have no ground for complaint with any of the rulings at the trial, or of the charge to the jury, and the judgment should be affirmed.

SELDEN, J., was absent. All the other judges concurred.

Judgment affirmed.

(See, also, *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. Rep. 264; *Cohen v. Mayor, etc.*, 113 N. Y. 532, 21 N. E. Rep. 700; *Marine Ins. Co. v. St. Louis, etc.*, R. Co., 41 Fed. Rep. 643; *Clifford v. Dam*, 81 N. Y. 52; *Calder v. Smalley*, 66 Iowa, 219, 23 N. W. Rep. 638.)

III. WHO RESPONSIBLE.

(108 Pa. St. 489.)

FOW V. ROBERTS.

(*Supreme Court of Pennsylvania.* March 9, 1885.)

NUISANCE—WHO LIABLE—LANDLORD AND TENANT.

Where a cess-pool is so constructed by the owner of the premises that the offensive matter deposited therein by his tenants necessarily percolates through to the adjoining premises, the owner is equally liable with the tenants for the injury to the adjoining occupant.

Error to the court of common pleas No. 2 of Philadelphia county, of July term, 1884, No. 17.

Action on the case by George Fow against Elizabeth Roberts. On the trial it appeared that a cess-pool on defendant's premises was constructed within a foot of the cellar wall on the adjoining premises owned and occupied by plaintiff; that defendant's premises were three houses, rented to tenants, all of whom had the use of such cess-pool; that when the offensive matter deposited therein by the tenants rose to the height of the plaintiffs' cellar floor it percolated through, and rendered his premises uninhabitable. The trial court held that the tenants alone were liable, and nonsuited plaintiff; whereupon plaintiff sued out this writ of error, assigning as error the entry of the nonsuit, and a subsequent refusal to take it off.

Argued before MERCUR, C. J., PAXSON, TRUNKY, STERRETT, GREEN, and CLARK, JJ.; GORDON, J., absent.

John H. Fow and Edward A. Anderson, for plaintiff in error. *Bradbury Bedell and Fred'k B. Vogel*, for defendant in error.

PAXSON, J. It needs but a cursory examination of the evidence in this case to see that the privy-well complained of was a nuisance of the most offensive character. It was situated but one foot from the

line which divided the property of the plaintiff from that of the defendant, and when filled to a certain point the filthy matter percolated through the wall into the plaintiff's cellar. Indeed, there appears to have been little dispute at the trial below either as to the existence of the nuisance or its character. The main question was, who was liable therefor, the tenant in possession, or the landlord who had demised the premises with the privy located as above described? The suit was against the landlord for maintaining the nuisance. The court below nonsuited the plaintiff, upon the ground that the tenant was alone liable.

The defendant contended that the well was not *per se* a nuisance; that when she leased the property to the present tenant, in 1879, no complaint had been made of the well, and that it had become a nuisance by the manner of its use by the tenants; that they had allowed it to be used by two or three families, and had neglected to have it cleaned at the proper time.

The law upon this subject was correctly stated in the recent case of *Knauss v. Brua*, decided at the last term in the middle district, (107 Pa. St. 85,) where it was said by our Brother Gordon: "We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises while in the possession of a tenant. To make the lessor so liable, the effect must be one that arises necessarily from a continuance of the use of the property as it was when the tenant took possession of it. But the converse of this proposition is also true; if the premises are so constructed, or in such a condition, that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable."

Applying this principle to the case in

hand, it is too clear for argument that the tenant would be responsible to the plaintiff for the flow of the offensive matter upon the premises of the latter. He is responsible for the reason that the act complained of is his. The filth was deposited there by himself, his family, or by others whom he permitted to use the privy.

Is the landlord also liable? We are not considering any question for liability of repairs, as between landlord and tenant. It does not arise necessarily in the case. But if the landlord constructed or maintained his privy in such position, as regards his neighbor's property, that its use would result in a nuisance to the latter, and demised it to a tenant, we are of opinion that he is responsible for the consequences of its use. The privy, as before stated, was within one foot of the plaintiffs' cellar wall. A property owner who so locates a privy on his premises ought to know that it may, and probably will, become a nuisance. To build a cess-pool now within two feet of the line of any adjoining lot would be a violation of a city ordinance, and it is a violation of said ordinance to maintain a cess-pool within said limits. The reason for this wise municipal regulation undoubtedly is that cess-pools so constructed are nuisances, and endanger, not only the comfort, but the health, of citizens.

The defendant having demised the premises in question to a tenant with a cess-pool so situated thereon that its use must necessarily result in a nuisance to the plaintiff, we are of opinion that she is liable to the plaintiff. It was urged, however, that it was only for the manner of its use that the well became a nuisance. We fail to see the force of this reasoning. The cess-pool was used for the very purpose for which it was constructed, and the tenant had the right to use it. We cannot measure the extent to which a cess-pool may be lawfully used. Its lawful use in this case resulted in a nuisance to the plaintiff. The defendant demised the premises, with the cess-pool so located that it would naturally produce such a result, and for the result we must hold her to be liable.

The judgment is reversed, and a *procedendo* is awarded.

(3 Allen, 264.)

MCDONOUGH v. GILMAN.

(*Supreme Judicial Court of Massachusetts*.
Nov. Term, 1861.)

1. NUISANCE—WHO LIABLE—LANDLORD AND TENANT.

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.

2. SAME—CONTINUING NUISANCE—NOTICE TO REMOVE.

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.

3. SAME.

The notice to a tenant to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.

Exceptions from superior court, Suffolk county.

Action of tort by Patrick McDonough against George W. Gilman for erecting and maintaining a nuisance on plaintiff's right of way. Verdict was rendered for plaintiff. Defendant alleged exceptions.

C. H. Hudson, for plaintiff. *T. L. Wakefield*, for defendant.

CHAPMAN, J. The plaintiff's declaration in this case is very loose and inartificial; but the amended count on which he relies states, in substance, that he has a right of way, as therein described, and that the defendant has obstructed it by erecting and maintaining on a part of it a staircase, privy, and vault. On the trial it appeared that these structures were placed there, not by the tenant, who is a lessee for years, but by his lessors; and that his lease contains the following clause: "The passage-ways around the said buildings [the leased premises] are reserved by the lessors, who hereby lease only the right of such use thereof as may be necessary for the enjoyment of the building aforesaid." One of these passage-ways is the way in question; and the fee of the land is in the lessors, subject to the plaintiff's right of way. The privy and vault existed before the defendant became tenant, about 18 years ago. It does not appear when the staircase was built.

The instruction to the jury that, if they found the privy was a nuisance, and the plaintiff abated it, and the defendant restored it, he is liable, was correct; for in such case the existing nuisance would have been erected by him, and not by his lessor. But the instruction does not appear to be applicable to the facts as reported. It is stated that "on one occasion the plaintiff commenced beating down said staircase with his axe, when the defendant restrained him therefrom; and on one occasion the plaintiff beat off the boards from said privy, and the defendant refitted it." It is not stated that the plaintiff removed the frame of the privy. He merely knocked off the boards, which would make it none the less a nuisance, and the defendant merely refitted it, which did not make it any more a nuisance than before. The act would be merely keeping and maintaining it, not erecting it. It would be like the case of *Beswick v. Cunden*, Cro. Eliz. 520. In that case the declaration alleged that the defendant kept and maintained a bank by which a brook was caused to flow around the plaintiff's land. The court said: "There is not here any offense committed by the defendant; for he alleged that he kept and maintained a bank, which is that he kept it as he found it; and it is not any offense done by him, for he did not do anything; and, if it were a nuisance before his time, it is not any offense in him to keep it." And the case is distinguished from other cases where every

using is a new nuisance, as the using of an aqueduct which takes water wrongfully from another. There every turning of the cock to let the water flow is a new nuisance. The act of refitting the privy must have been an act which rendered it more a nuisance to the passage-way than it would otherwise have been, to make the defendant liable as an erector of the nuisance. The act of the defendant in restraining the plaintiff from beating down the staircase with an axe is not embraced in this ruling, and the character and circumstances of the act do not fully appear.

The other instructions excepted to were as follows: "That, if the privy and staircase were an obstruction of the plaintiff's right of way, then the tenant is liable to an action, if the obstruction continued, and if he occupied the premises after notice was given to him by the plaintiff to remove the obstructions, although they were erected by his landlord; and that the law does not prescribe the kind of notice which should thus be given by the plaintiff to the defendant to remove said obstructions;" and he submitted the question to the jury whether such notice had or had not been given. Thereport states all the evidence of notice that was offered, and it is as follows: "The plaintiff complained to the defendant of the erection of the staircase at the time when it was erected; and on another occasion the plaintiff asked the defendant how he thought he could drive a team with two tons of coal by said stairway to his house." His attempting to beat down the staircase with an axe, and knocking the boards off from the privy, are not a notice. The court are of opinion that this instruction was not quite correct.

In *Penruddock's Case*, 5 Coke, 100*b*, it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee, unless he does not reform the nuisance after request made. In *Winsmore v. Greenbank*, Willes, 583, *Penruddock's Case* is referred to, with the remark that the law is certainly so. In 2 Chit. Pl. (6th Amer. Ed.) 770, note, pleaders are advised to allege in the declaration a special request to remove the nuisance in actions against the grantee of the premises. In *Pierson v. Glean*, 1 N. J. Law, 37, *HORN-BLOWER, C. J.*, says: "The law, as settled in *Penruddock's Case*, has never, I believe, been seriously questioned since." This action was for maintaining a dam erected by a former owner, and it was held that it could not be maintained without a request to reform the nuisance. In *Woodman v. Tufts*, 9 N. H. 92, the same doctrine is held, and the court proceed to say: "And the question arises, what that re-

quest must be. It undoubtedly must be so distinctly and definitely stated as to convey clearly the ground of the complaint, with a notice that the plaintiff will not longer submit to the continuance of the cause of the injury." "No particular form of words is required." This does not quite come up to the law of *Penruddock's Case*. We think that there should be, in some unequivocal language, a request to the tenant to reform or remove a nuisance, before he can be held liable for its continuance. It is not unreasonable to hold the plaintiff who proceeds against the lessee to this strictness. The landlord or grantor himself is liable, notwithstanding his lease or grant, for the continuance of the nuisance. This was settled in *Roswell v. Prior*, 12 Mod. 635. In that case the plaintiff had recovered against the defendant for erecting a building which stopped the plaintiff's ancient lights. The defendant had granted over the ground with the nuisance to another, and contended that he was no longer liable, but that the action should be against the lessee. But the court said: "Surely this action is well brought against the erector, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for surely when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness." But the tenant, who merely enters upon the premises and occupies them under an obligation to pay rent for the whole and to commit no waste, cannot reasonably be regarded as a wrong-doer till the party injured distinctly and unequivocally complains to him of the injury, and informs him that he is expected to act in the matter, and remove it. In *Ryppon v. Bowles*, Cro. Jac. 373, it is said that COKE, C. J., inclined to the opinion that a tenant for years is not liable for the mere occupation of a building erected by his lessor, and which obstructs the plaintiff's lights, because his tearing down the building would be waste as to his landlord.

In the present case the language proved does not amount to a request, and the jury should have been so instructed; for, though verbal communications are to be construed by the jury under instructions from the court, yet when a communication cannot, by any fair interpretation, be regarded as a sufficient notice or request, the jury should be so instructed as to its meaning.

Exceptions sustained.

(See, also, *Sandford v. Clarke*, 21 Q. B. Div. 398; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. Rep. 841; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. Rep. 193, which has a full review of the authorities; *Joyce v. Martin*, 15 R. I. 553, 10 Atl. Rep. 620; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. Rep. 1010; *Clifford v. Cotton-Mills*, 146 Mass. 47, 15 N. E. Rep. 84; *Ingwersen v. Rankin*, 47 N. J. Law, 15.)

IV. PRIVATE INJURY FROM PUBLIC NUISANCE.

(13 Allen, 95.)

WESSON v. WASHBURN IRON CO.

*(Supreme Judicial Court of Massachusetts.
Oct. Term, 1866.)*

1. PUBLIC NUISANCE—SPECIAL DAMAGE TO INDIVIDUALS.

Where the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, a mere deprivation or obstruction of the use which hinders all persons alike, and does not cause any special or peculiar damage to any one, furnishes no valid cause of action to an individual, although he may suffer inconvenience greater in degree than others from the alleged obstruction or hindrance. But when the alleged nuisance injures private property, or the health or comfort of an individual, it is in its nature special and peculiar, and cannot be said to cause a common or public damage; and it is actionable, though it is committed in a manner and under circumstances which would render the guilty party liable to an indictment for a common nuisance.

2. SAME—NOISE, SMOKE, AND NOXIOUS VAPORS.

A person may recover for injuries to his premises caused by noise, smoke, and noxious vapors in the operation of another's rolling-mills, though many other persons in the same neighborhood are injured in the same way.

Exceptions from superior court, Worcester county.

Action by Betsey Wesson against the Washburn Iron Company for injuries to plaintiff's premises caused by the operation of defendant's rolling-mill and foundry. It appeared at the trial that defendant's works were erected in a proper locality, and were properly constructed and managed, but that the jarring and noise from the machinery, and the smoke, cinders, dust, and gas from its operation, were so great as materially to injure plaintiff's premises. Plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust, and gas from defendant's works, it was no defense to the action that many other houses in the neighborhood were affected in a similar manner. But the judge declined so to rule, and instructed the jury, in accordance with defendant's request, that plaintiff could not maintain the action if it appeared that the damage which plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood. The jury found a verdict for defendant. Plaintiff alleged exceptions.

G. F. Hoar, (G. F. Verry, with him.) for plaintiff. *F. H. Dewey, (E. B. Stoddard, with him.)* for defendants.

BIGELOW, C. J. * * * *. The interesting question is to be considered whether the instructions under which the case was submitted to the jury were correct, and appropriate to the facts in proof. There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an ac-

tion cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own Reports. *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, Id. 511, 514; *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276, 283; *Holman v. Townsend*, 13 Metc. (Mass.) 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Railroad Co.*, Id. 506, 511; *Blood v. Railroad Corp.*, 2 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, Id. 501; *Fall River Iron-Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 224.

But it will be found that in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege, common to every person in the community, is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency

it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that, in effect, a wrong-doer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: That, when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case, the act, of itself, does no wrong to individuals distinct

from that done to the whole community. But when the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly, multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it, and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed, thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & S. 66, and in *Tipping v. Smelting Co.*, 4 Best & S. 608-615, 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. Railway Co.*, 8 Sim. 193; *Soltau v. De Held*, 2 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained if it appeared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

(See, also, *Francis v. Schoellkopf*, 53 N. Y. 152; *Brayton v. Fall River*, 113 Mass. 218; *Railroad Co. v. Jones*, 111 Pa. St. 204, 2 Atl. Rep. 410; *Crook v. Pitcher*, 61 Md. 510; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. Rep. 813; *Clark v. Peckham*, 10 R. I. 35; *City of Chicago v. Building Ass'n*, 102 Ill. 379; *Brown v. Watson*, 47 Me. 161; *Holmes v. Cortnell*, 80 Me. 31, 12 Atl. Rep. 730; *Mehrhof Bros. Brick Manuf'g Co. v. Delaware, etc., R. Co.*, 51 N. J. Law, 56, 16 Atl. Rep. 12.)

V. LEGALIZED NUISANCE.

(136 Mass. 289.)

SAWYER *et al.* v. DAVIS *et al.*(Supreme Judicial Court of Massachusetts.
Jan. 9, 1884.)

1. NUISANCE — LEGALIZED AFTER INJUNCTION GRANTED.

The legislature may, by virtue of its police power, pass an act providing that manufacturers and others employing workmen may, for the purpose of giving notice to such employes, ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the municipal authorities may designate, though their use of such bells, whistles, and gongs operates to the injury of individuals, which otherwise a court of equity would restrain.

2. SAME—DISSOLUTION OF INJUNCTION.

An injunction restraining the ringing of a factory bell, used to notify employes, before a certain hour in the morning, does not give a vested right which the legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.

Case reserved.

Bill of review. Plaintiffs, manufacturers of Plymouth, were, on October 1, 1881, restrained by a decree of this court, on a bill in equity by defendants, from ringing the bell on their mill before the hour of 6:30 A. M. *Davis v. Sawyer*, 133 Mass. 289. March 28, 1883, the legislature passed an act providing that "manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employes, to ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate." St. Mass. 1883, c. 84. Under such statute the selectmen of the town licensed plaintiffs to ring their bell at 5 A. M. The bill prayed a dissolution or modification of the injunction to enable plaintiffs to act under their license. Defendants demurred to the bill, claiming that the statute was unconstitutional so far as applicable to defendants. At the hearing before COLBURN, J., he reserved the case for the consideration of the full court.

P. D. Allen, for plaintiffs. *C. G. Davis*, for defendants.

C. ALLEN, J. Nothing is better established than the power of the legislature to make what are called "police regulations," declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge*, 126 Mass. 438-441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner in such manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is

subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business, in a reasonable and proper manner, shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. *Merrifield v. Worcester*, 110 Mass. 216, 219. In this conflict of rights, police regulations by the legislature find a proper office in determining how far, and under what circumstances, the individual must yield, with a view to general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they would find ample remedy and vindication in the courts. But if the legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge*, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the

business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. *Presbrey v. Railway*, 103 Mass. 1, 6, 7; *Walker v. Railway*, Id. 10-14; *Baneroff v. Cambridge*, 126 Mass. 441; *Call v. Allen*, 1 Allen, 137; *Com. v. Chemical Works*, 16 Gray, 231-233; *Struthers v. Railway*, 87 Pa. St. 282; *Hatch v. Railroad*, 25 Vt. 142, 147; *Brand v. Railway*, L. R. 1 Q. B. 130, L. R. 2 Q. B. 223, L. R. 4 H. L. 171; *Vaughan v. Railway*, 5 Hurl. & N. 679, 685, 687; *Rex v. Pease*, 4 Barn. & Adol. 30; *Sedg. St. & Const. Law*, 435, 436.

The recent case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable, as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight, though real, annoyance, naturally and necessarily resulting, in a greater or less degree, to all owners of property in the neighborhood, from a use of property, or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such owner to relief, but, rather, that the court expressly waived the expression of an opinion upon the point.

In this commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to recognize the distinction between such serious disturbances as existed in the case referred to and comparatively slight ones, which differ in degree only, and not in the kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of the individual may be sanctioned by the legislature, under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the legislature is only authorized to pass reasonable laws. The line of distinction cannot be so

laid down as to furnish a rule for settling all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Com. v. Alger*, 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois*, 94 U. S. 113-134.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on, as authorizing the plaintiffs to ring their bell, (St. 1883, c. 84,) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character it is not unlike numerous other instances to be found in our statutes, where the legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling-alleys.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defense to an indictment for a nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some public right, such as a right to travel upon a highway or river. His public right may clearly be regulated and controlled by the legislature after a decision by the court as well as before. *Com. v. Essex Co.*, 13 Gray, 239, 247. But the argument is urged upon us with great force that in the present case there had been a judicial determination that the

ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights. In the first place, we can have no doubt that the statute, by its just construction, is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license, (*Com. v. Kidder*, 107 Mass. 188;) and in some cases, even where a particular license or authority has been given, as to keep an inn, ale-house, or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. *Rex v. Cross*, 2 Car. & P. 483; *Com. v. McDonough*, 13 Allen, 581, 584; *State v. Mullikin*, 8 Blackf. 260; *U. S. v. Elder*, 4 Cranch, C. C. 507. And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such cases it is not to be assumed that it was contemplated by the legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. *Eames v. Worsted Co.*, 11 Metc. (Mass.) 570; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Com. v. Kidder*, 107 Mass. 188. But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The legislature must be deemed to have determined that the benefit is greater than the injury and annoyance, and to have intended to enact that the public must submit to the disturbance for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance. It is then argued that the legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff, under an existing rule of law, has a right of action to recover damages for a past injury suffered by him, his remedy cannot be cut off by an act of the legislature. So, also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or

costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand, the legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of the police power of the legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens. It is, indeed, in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute. Their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells, except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bell at other hours not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs, and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business, and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonable and proper to grant. The ears of the court could not, under such new circumstances, be absolutely shut to an application for its modification, without any

new statute declaring the policy of the commonwealth in respect to any branch of business or employment. But a declaration by the legislature that, in its judgment, it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest consideration of the court; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction.

The method of procedure to which the plaintiffs have resorted is the usual and

proper one in such circumstances. 2 Daniell's Ch. Pl. (4th Amer. Ed.) 1577, note 3; Story, Eq. Pl. § 494 et seq.; Clapp v. Thaxter, 7 Gray, 384. And, for authorities tending to show that the plaintiffs are entitled to the relief which they seek in consequence of a subsequent statute changing the rights of the parties, see Pennsylvania v. Bridge Co., 18 How. 421; Clinton Bridge, 10 Wall. 454, 463; Gilman v. Philadelphia, 3 Wall. 713, 732; South Carolina v. Georgia, 93 U. S. 4, 12; Bridge Co. v. U. S., 105 U. S. 470, 480; Com. v. Railroad Co., 14 Gray, 93, 97; Bartholomew v. Harwinton, 33 Conn. 408.

Demurrer overruled.

(See, also, Cogswell v. Railroad Co., 103 N. Y. 10, 8 N. E. Rep. 537; Miller v. Mayor, etc., 109 U. S. 385, 3 Sup. Ct. Rep. 223; Baltimore & P. R. Co. v. Fifth Baptist Church, 103 U. S. 317, 2 Sup. Ct. Rep. 719; Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. Rep. 197; Railroad Co. v. Truman, L. R. 11 App. Cas. 45.)

Bowen & Bowen.

VI. ABATEMENT OF NUISANCE.

(11 Mees. & W. 173.)

JONES V. WILLIAMS.

(Court of Exchequer. Jan. 23, 1843.)

1. NUISANCE—ABATEMENT—NOTICE TO REMOVE.

A person has no right to enter upon the land of another to abate a nuisance of filth, without previous request or notice to the occupant to remove it, unless it appears that such occupant was the original wrong-doer by placing it there, or possibly that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health.

2. SAME.

Such request or notice to the occupant is necessary, if, when he acquired possession of the land, the nuisance already existed upon it, and he simply omitted to remove it.

Rule to show cause why judgment should not be entered for plaintiff *non obstante veredicto*.

Action of trespass to land brought by Jones against Williams. Defendant by his plea justified the entry to abate a nuisance of filth permitted by plaintiff upon his adjoining lands. The verdict was for defendant. Plaintiff obtained a rule to show cause why judgment should not be entered in his favor *non obstante veredicto*.

Jervis & Welsby showed cause. *Erle & Townsend*, contra.

PARKE, B. A rule was obtained in this case by Mr. Erle for judgment *non obstante veredicto* on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass *quare clausum fregit*, stated that the defendant, before and at the said time when, etc., was possessed of a dwelling-house near the *locus in quo*, and dwelt therein; and that the plaintiff, before and at, etc., injuriously and wrongfully permitted and suffered large quantities of dirt, filth, manure, compost, and refuse to be, remain, and accumulate on the *locus in quo*, by reason whereof divers noxious, offensive, and unwholesome smells, etc., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass by entering in order to abate the nuisance, and in so doing damaging

the wall, and digging up the soil. The question for us to decide is whether this plea is bad after verdict, and we are of opinion that it is. The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and, if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, nor showing that the continuance was of such a description as not to require one.

It is clear that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo*, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302, 3 Dow. & R. 556, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord WYNNFORD'S *dictum* is in favor of this objection, for he states that a notice is requisite in all

cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. Penruddock's Case, 5 Coke, 101a, shows that an assize of *quod permittat prosterne* would not lie against the alienee of the party who levied it, without notice. The judgment in that case was affirmed on error; and in the king's bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee,—that is, as it should seem, with notice; for in Jenkin's Sixth Century Case, 57, (no doubt referring to Penruddock's Case,) the law is thus stated: "A. builds a house so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now, D. cannot abate the said nuisance, or have a *quod permittat* for it, before he makes a request to C. to abate it, for C. is a stranger to the wrong. It would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request." We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation by the breach of which it was created.

ABINGER, C. B., observed that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice, but then it should be so pleaded; in which the rest of the court concurred.

Rule absolute.

(126 Pa. St. 511, 18 Atl. Rep. 15.)

CROSLAND v. BOROUGH OF POTTSVILLE.

(Supreme Court of Pennsylvania. May 27, 1889.)

NUISANCE—ABATEMENT—LICENSE.

Where the licensee of the right to conduct surface water from his premises across the land of another exceeds his privilege, and uses the drain in such a manner as to create a public nuisance, by conducting noxious matter through it, the licensor may, after due notice, close up the drain, and on a continued use of the drain by the licensee, thus causing an overflow into the highway, the remedy of the borough authorities is against the licensee, and they have no right to open up the drain through the licensor's premises.

Error to court of common pleas, Schuylkill county.

Action for damages by John M. Crossland against the borough of Pottsville, for reconstructing a drain across plaintiff's premises. A verdict was directed and rendered for defendant, and plaintiff brings error.

J. W. Moyer, (with him John W. Ryon and W. F. Shepherd,) for plaintiff in error. R. H. Koch, for defendant in error.

CLARK, J. After the argument of this case, it was assigned to our late Brother TRUNKEY for an opinion. After his death, the reassignment of it was overlooked, and hence the delay in entering judgment. We will not enter into any extended discussion of the case, but will briefly state the grounds for the judgment we now enter. As the jury received binding instructions to find for the defendant, the testimony adduced by the plaintiff, with all reasonable inferences to be drawn therefrom, must be taken as establishing the true theory of the case on the facts. We assume, therefore, that Crossland gave to Col. Brown the right to conduct the surface water only from his premises through this drain into the Schuylkill river; that after the drain pipes were put down he turned into it the foul matter which came from his cess-pool and privy vaults, and that he sold a similar privilege to others; that thereby the drain, instead of being used to conduct the surface and mountain water as originally intended, was converted into a common sewer, which caused the plaintiff's house to be untenable, and it is believed unhealthy, and thus became a nuisance, which the plaintiff claimed the right to abate. There is testimony also that the privilege given to Brown was experimental merely. If it should prove unsatisfactory, Crossland says he had the right at any time to terminate it. The privilege must be treated, therefore, as a mere license, which it was in Crossland's power to revoke at his pleasure. It must be assumed, also, that the persons who were employed to adjust these pipes, and who reconstructed the sewer so as to again throw its contents upon the plaintiff's premises, were acting under authority from the borough, and were directed to do just what was done, and that the borough was responsible for these acts. There is abundant testimony to justify this inference, no matter what the facts may have been. The drain was put down by Brown for his own convenience. The borough had nothing to do with it; but as it was laid in the street, and suffered to remain, and the borough exercised its authority to maintain it, we may infer that it was originally placed there by permission, or that its construction was afterwards assented to. Nor had Crossland anything to do with the drain beyond yielding his assent that it might be laid in his lots, to lead from the street to the river, and to conduct the surface water. It conferred only a limited right.

When a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess. *Barclay v. Com.*, 25 Pa. St. 503; *Taggart v. Com.*, 21 Pa. St. 527. But, if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. *Wood, Nuis.* 804; *Add. Torts*, § 269; *Cawkwell v. Russell*, 26 Law J. Exch. 34; *Beard v. Murphy*, 37 Vt. 99. If Brown abused the privileges which had been given him by using these pipes as a channel

for noxious and offensive matter, instead of surface water, and thereby created a nuisance. Crossland had an undoubted right, after due notice, to go either upon the premises of Brown, or on his own premises, and abate the nuisance by stopping up the drain, thereby preventing even the surface water from flowing therein, until Brown reduced his use thereof within the proper limits. Of course, a person who undertakes to abate a nuisance proceeds at his peril. He takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment, he is answerable in damages, and if a breach of the peace is involved he is liable to indictment for the result. But, creating no breach of the peace, he had a right to abate this nuisance. The noxious matter which passed through the drain under the road came from Brown's premises. It was his (Brown's) duty to convey it to the river or to some other place where it would not become offensive and injurious to the public, and when he received notice that the drain was obstructed it was his duty to stop the flow. It was not an unlawful obstruction of the drain which caused the public nuisance. It was the continued use of the drain by Brown after he knew it was obstructed that caused the overflow into and upon the highway, and for

this Brown was responsible. Brown's recourse, if he had any, was upon Crossland. He had no right to discharge the sewer into the street. The borough authorities of Pottsville had no more right to open up the sewer through Crossland's property than Brown had. Their attempt to do so was wholly without authority, and in denial of the legal rights of Crossland, who had a clear right in a lawful and peaceable manner to protect his property against the unlawful use of this drain by Brown, and against the unlawful acts of any other person who might come to aid in perpetrating this wrong upon him. Brown was the offending party, and the officers of the borough should have given their attention to him. They should have obliged him to abate the public nuisance which he had set up and was steadily maintaining.

We decide this case upon the force and effect of the plaintiff's testimony, adopting his theory of the case as the correct one. When it comes to be tried again, and the evidence on both sides is submitted to the jury, the case may be presented in an entirely different light. The court erred, we think, in submitting the case to the jury with binding instructions to find for the defendant.

Judgment is reversed, and a *venire facias de novo* awarded.

(See, also, *Larson v. Furlong*, 50 Wis. 681, 8 N. W. Rep. 1; 63 Wis. 323, 23 N. W. Rep. 534; *Godsell v. Fleming*, 59 Wis. 52, 17 N. W. Rep. 679; *Brown v. Perkins*, 12 Gray, 89; *Cole v. Kegler*, 64 Iowa, 59, 19 N. W. Rep. 843; *Griffith v. McCullum*, 46 Barb. 561; *Brown v. De Groff*, 50 N. J. Law, 409, 14 Atl. Rep. 219; *Roberts v. Rose*, 4 Hurl. & C. 103; *Fields v. Stokley*, 99 Pa. St. 306; *Bowden v. Lewis*, 13 R. L. 189.)

INJURIES BY ANIMALS.

(73 N. Y. 195.)

MULLER v. MCKESSON *et al.*

(*Court of Appeals of New York*. April 2, 1878.)

1. VICIOUS ANIMALS—LIABILITY FOR INJURIES.

A person keeping a mischievous or vicious animal, with knowledge of its propensities, is bound to keep it secure at his peril. He cannot excuse himself from liability for injuries inflicted by it by proof of due care.

2. SAME—NEGLIGENCE OF CO-SERVANT.

The negligence of a servant in loosing his master's ferocious dog is no defense to an action for the injury caused by the dog to a fellow-servant, as the *gravamen* of the action is the keeping of a ferocious animal with knowledge of its nature, and not the negligent care of it.

3. SAME—NEGLIGENCE OF PERSON INJURED.

If a person, with full knowledge of the evil propensities of an animal, wantonly excites it, or voluntarily and unnecessarily puts himself in the way of such animal, he cannot recover for the injuries thereby sustained by him, but the owner will not be excused by slight negligence or want of ordinary care of the person injured.

4. SAME.

It was the duty of plaintiff, a watchman in defendants' employ at their factory, to open the gate of the yard every morning to admit the workmen. In such yard defendants kept a ferocious Siberian blood-hound, which was usually loosed at night to protect the premises, and chained during the day. Defendants' engineer

had charge of the dog, and it was his custom to notify plaintiff when the dog was loose. Plaintiff, while proceeding across the yard in the customary manner to open the gate, and having no knowledge that the dog was loose, was attacked by it and severely injured. *Held*, that plaintiff was not bound to look and see that the dog was fastened before going into the yard, and that he was entitled to recover from defendants for his injuries.

5. MASTER AND SERVANT—RISK OF EMPLOYMENT.

A person in the employ of another, charged with specific duties, does not, while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.

Appeal from supreme court, general term, second department.

Action by August Muller against John McKesson and others for damages sustained by the bite of a savage and ferocious dog owned and kept by defendants. The jury found a verdict for plaintiff, and judgment was entered thereon, and was affirmed upon appeal to the general term. 10 Hun, 44. From the judgment of the general term defendants appealed.

Charles H. Mundy, for appellants. *Frederrick A. Ward*, for respondent.

CHURCH, C. J. The defendants had a

chemical factory in Brooklyn, and owned a ferocious dog of the Siberian bloodhound species, which was kept in the inclosed yard surrounding the factory, and generally kept fastened up in day-time and loosed at night as a protection against thieves. The plaintiff was in the employ of the defendants as a night watchman. It was his duty to open the gate to the yard every morning to admit the workmen, and to do this he would pass from the door of the factory across a corner of the yard to the gate. On the morning in question, as the plaintiff was returning from opening the gate, he was attacked from behind by the dog, thrown to the ground, and severely bitten; and after freeing himself, and while endeavoring to reach the factory, was again attacked, and bitten and seriously injured. Upon the close of the evidence, and after a motion for a nonsuit had been denied, the judge decided that there was no question for the jury but the question of damages, to which there was an exception. It is questionable whether this exception is available to the defendants in this court. After the defendants had asked the court to determine the questions as matters of law in his favor on a motion for a nonsuit, and they afterwards desired such questions to be submitted to the jury as questions of fact, it was their duty to have specified the questions which they desired to have submitted. *O'Neill v. James*, 43 N. Y. 84-93; *Winchell v. Hicks*, 18 N. Y. 558. The court might have assumed that the defendants rested upon their legal propositions, and thus have been misled. It would be, perhaps, rather rigorous to enforce this rule in this particular case, and we have concluded to waive its application.

The points urged by the appellants in this case are—*First*, that the plaintiff was guilty of contributory negligence, or at least that the evidence would have warranted the jury in so finding; *second*, that the plaintiff knew the vicious habits of the dog, and by voluntarily entering upon and continuing in the employment of the defendants he assumed the risk of such accidents; *third*, that if the injury was occasioned by the negligence of the engineer in not properly fastening the dog, or in omitting to notify the plaintiff that he was loose, it was the negligence of a co-servant, for which the defendants are not liable.

It may be that, in a certain sense, an action against the owner for an injury by a vicious dog or other animal is based upon negligence; but such negligence consists, not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious, and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. *Earl v. Van Alstine*, 8 Barb. 630. The negligence consists in keeping such an animal. In *May v. Burdett*, 9 Adol. & E. (N. S.) 101, DENMAN, C. J., said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensi-

ties, is bound to keep it secure, at his peril, and that, if he does mischief, negligence is presumed." When accustomed to bite persons, a dog is a public nuisance, and may be killed by any one when found running at large. *Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638. And, when known to the owner, corresponding obligations are imposed upon him. Lord HALE says: "He [the owner] must, at his own peril, keep him safe from doing hurt, for though he use his diligence to keep him up, if he escape, and do harm, the owner is liable in damages." In *Kelly v. Tilton*, 2 Abb. Dec. 495, WRIGHT, J., said: "If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril." In *Wheeler v. Brant*, 23 Barb. 324, Judge BALCOM said: "Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them, or confine them as soon as they know their dangerous habits, or answer in damages for their injuries." In *Card v. Case*, 57 E. C. L. 622, COLTMAN, J., said "that the circumstances of the defendants keeping the animal negligently is not essential; but the *gravamen* is the keeping the ferocious animal, knowing its propensities." The cases are uniform in this doctrine, although expressed in a variety of language by different judges. *Smith v. Pelah*, 2 Strange, 1264; *Jones v. Perry*, 2 Esp. 482; *Greason v. Keteltas*, 17 N. Y. 496; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 Car. & P. 138; *Rider v. White*, 65 N. Y. 54.

In some of the cases it is said that from the vicious propensity, and knowledge of the owner, negligence will be presumed, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and, unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute. "This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound, at his own peril, to prevent mischief, is a *presumptio juris et de jure*, against which no averment or proof is receivable. It is not a 'presumption,' in the ordinary sense of the word, raising a *prima facie* case which may be rebutted." *Card v. Case*, supra, p. 623, note *b*. It follows that the doctrine of non-liability arising from the negligence of a co-servant in not properly fastening the animal, or in not giving notice of his being loose, cannot be invoked, for the reason that, the negligence of the master being immaterial, that of his servant must be also.

The point as to contributory negligence presents the most difficulty. There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Smith v. Pelah*, 2 Strange, 1264, the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the chief justice saying: "For it was owing to his not hanging the dog on the first notice."

It is not stated that the person injured knew of the dog's propensities, or that it was done intentionally. In *Woolf v. Chalker*, 31 Conn. 130, it is said that the owner is liable, "irrespective of any questions of negligence of the plaintiff;" and citing *May v. Burdett* and *Card v. Case*, supra.

In *May v. Burdett* the chief justice, after approving of the ruling in *Smith v. Pelah*, 2 Strange, supra, and a passage from *Hale's Pleas of the Crown*, (page 430,) said: "It may be that if the injury was solely occasioned by the willfulness of the plaintiff, after warning, that may be a ground of defense, but it is unnecessary to give any opinion as to this." It is not intimated, as before stated, in *Smith v. Pelah*, that the treading on the toes of the dog was done intentionally, or with knowledge of his viciousness; and I do not think that it can be claimed from authority, and certainly not from principle, that no act of the person injured would preclude him from recovering, however negligent or willful. The apparent conflict on this point arises, I think, mainly in not making a proper application of the language to the facts of the particular case. If a person, with full knowledge of the evil propensities of an animal, wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury. *Cogswell v. Baldwin*, 15 Vt. 404; *Koney v. Ward*, 36 How. Pr. 255; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628.

But as the owner is held to a rigorous rule of liability on account of the danger to human life and limb, by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, act should be proved, with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. *Brock v. Copeland*, 1 Esp. 203, cited and relied upon by the counsel for the appellant, is in some of its features like this; and, while some of the language of Lord KENYON is not in harmony with that used in other cases, yet from the facts stated it is fairly inferable that the foreman voluntarily went into the yard at an unusual time, and, so far as appears, without business, knowing that the dog was loose, and knowing his ferocious nature. The question, then, recurs whether, from the facts appearing in this case, the jury would have been justified in finding that the plaintiff was guilty of that kind of negligence which would relieve the defendants; in other words, could they have found that, in any proper sense, the plaintiff brought the injury upon himself? He was in discharge of his duty, at the proper time and in the right place. He passed

from the factory to the gate in the direct path, and was returning when he was attacked by the dog. In *Blackman v. Simmons*, 3 Car. & P. 138, the injury was by a vicious bull, and the court laid stress upon the circumstance that the plaintiff was traveling where he had a right to go, and said: "If the plaintiff had gone where he had no right to go, that might have been an answer to the action." It was not shown that the plaintiff was out of his place; nor, what was more important and indispensable, was it shown that the plaintiff had notice that the dog was loose, or that he had reason to suppose that he was loose. It was the custom of Godfrey, the engineer, to loose the dog at night and fasten him in the morning, and to notify the plaintiff when the dog was loose. No such notice was given. The plaintiff testifies positively that he did not know or suppose the dog was loose; and from the evidence of Godfrey, called by the defendants, it is inferable that the dog had not been loosed for several days, and, if it had, the plaintiff had a right to suppose that Godfrey had fastened him that morning. It is sufficient to say that the evidence did not show that the plaintiff had notice that the dog was loose, nor were the circumstances such as to induce him to believe that such was the fact. If the negligence of the plaintiff is to prevail, it must be predicated upon not taking the precaution to look, examine, and ascertain whether the dog was fastened or not. The plaintiff might have ascertained by examination whether the dog was fastened in his kennel or not; but I do not think that he was bound to exercise that degree of care, or that the defendant can be relieved from liability because he did not.

It does not appear that such had been his habit, or that his attention had been called to any circumstance to call for unusual precaution. The evidence must have been sufficient to warrant the jury in finding actual notice that the dog was loose, or, at least, that the plaintiff had reason to so believe. This rule is quite as liberal as ought to be adopted in favor of a person who keeps an animal of such savage ferocity as this was found to be. *Hott v. Wilkes*, 3 Barn. & Ald. 308, and *Bird v. Holbrook*, 4 Bing. 628, were both cases of spring guns. In the former the person injured had notice, and in the latter, though a trespasser, he had not; and the action was held maintainable in the latter, and not in the former. *BEST, C. J.*, sat in both cases, and in the last said: "If anything which fell from me in *Hott v. Wilkes* were at variance with the opinion I now express, I should not hesitate to retract it; but the ground on which the judgment of the court turned in that case is decisive of the present, and I should not have labored the point that the action was not maintainable in that case, on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given." In the former case *HOLROYD, J.*, expresses the principle of non-liability, when notice has been given, to be that the act which produced the injury to the plaintiff "must be

considered wholly as his act, and not the act of the person who placed the gun there."

As "negligence," in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity, and out of regard to the sanctity of human life; but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences.

The evidence in this case falls far short of warranting a verdict that the plaintiff had committed any such act. As before stated, he had no notice that the dog was loose, but had every reason to suppose that he was fastened, and did in fact suppose so. He was in the discharge of his duty, and was not called upon to institute an inquiry whether the dog had broken his fastenings, or that Godfrey had

been negligent in not giving him notice that the dog was loose.

The remaining point, that the plaintiff assumed the risk of such accidents, is not tenable. The rule is that a servant assumes the ordinary risks incident to the business in which he engages. What were the risks of his employment here, as it respects the dog? He was informed, it is true, of the nature of the animal, but he was also told that the dog would be kept fastened, and the uniform habit was to notify him when the dog was loose. By the terms of his employment, and the conduct of those who represented the defendants, the most that can be said is that he assumed the risks consequent upon the keeping of a ferocious dog, which was kept fastened except when he was otherwise notified. Beyond this the plaintiff is entitled to the same protection as other persons. This is not a case for relaxing the rule of liability. The dog was of immense size, and a brute as savage as a tiger or a lion, and should be more properly classed with such wild beasts than with the domestic dog, which, although useless, is generally comparatively harmless. He had no respect for persons. In the language of the person who sold him to defendants, "he bit everybody." There is no legal excuse for exposing human life to the ferocity of such an animal. The judgment must be affirmed. All concur, except RAPPALLO, J., absent.

Judgment affirmed.

(See, also, *May v. Burdett*, 9 Q. B. 101; *Filburn v. People's Palace, etc., Co.*, 25 Q. B. Div. 253; *Lynch v. McNally*, 73 N. Y. 347; *Perkins v. Mossman*, 44 N. J. Law, 579; *Spring Co. v. Edgar*, 99 U. S. 645; *Godeau v. Blood*, 52 Vt. 251; *Twigg v. Ryland*, 62 Md. 380; *Laherty v. Hogan*, 13 Daly, 533; *Woolf v. Chalker*, 31 Conn. 127.)

TRESPASS TO PERSONAL PROPERTY.

I. WHAT CONSTITUTES A TRESPASS.

(37 Ala. 430.)

WHITE v. BRANTLEY.

(*Supreme Court of Alabama*. Jan. Term, 1861.)

TRESPASS TO PERSONAL PROPERTY — PROPERTY SUBJECT OF ACTION.

An action of trespass lies by the owner of a dog for destroying it, though not at the time in his possession, but loaned to another.

Appeal from circuit court, Dallas county.

Action of trespass by White against Brantley for killing plaintiff's dog. Defendant pleaded that the dog, at the time of the alleged killing, was not in plaintiff's possession. Plaintiff replied that the dog was in the possession of a certain third person under a loan from plaintiff. Judgment was given for defendant upon the pleadings, which plaintiff assigned as error.

WALKER, C. J. Dogs are animals *dom-*

itæ naturæ, and although they may not be, in the estimation of the common law, of such value as that the stealing of them amounts to larceny, yet an action at law lies for destroying them. There is no distinction between them and other chattels, as to the possession necessary to the maintenance of an action of trespass. There is a distinction as to animals *feræ naturæ*; but dogs are not animals *feræ naturæ*. 4 Bl. Comm. 236; *Ireland v. Higgins*, Cro. Eliz. 125; *Wright v. Ramscoat*, 1 Saund. 85; *Case of Swans*, 7 Coke, 18; *Parker v. Mise*, 27 Ala. 480. It follows that, to the maintenance of this action, it was not requisite that the plaintiff should have had actual possession of the dog. If he was the owner of the dog, and the dog was loaned out at the time, the general property, "*prima facie*, as to all civil purposes, draws to it the possession."

Reversed and remanded.

(12 Me. 67.)

HOBART V. HAGGET, (in part.)

(Supreme Judicial Court of Maine. April Term, 1835.)

TRESPASS TO PERSONAL PROPERTY—INTENT—MISTAKE.

A mistake will not excuse a trespass, nor is the intent material. Where there is a mistake between the seller and purchaser as to the article sold, the seller supposing he has sold one article while the purchaser supposes he has bought another, of which he takes possession, he will be liable in trespass.

Exceptions from court of common pleas.

Action of trespass for taking and converting an ox, the property of plaintiff. It appeared at the trial that plaintiff sold defendant an ox, and told him to go to his place and take it, and that defendant went and took out of plaintiff's field an ox which he supposed was the one he purchased. Plaintiff claimed and testified that such ox was not the one he intended to sell, or supposed defendant considered himself as buying. The court instructed the jury that if they were satisfied that there had been an innocent mistake between the parties, and that defendant had supposed he had purchased the ox in question when in fact plaintiff supposed he was not selling that ox, but another, they would find for plaintiff, to which defendant excepted. The verdict was for plaintiff for the value of the ox taken. Defendant alleged exceptions.

Fessenden & Deblois, for plaintiff. *Mr. Davels*, for defendant.

PARRIS, J. The ox taken by defendant was the property of the plaintiff, and although the defendant attempted to prove that he purchased that ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser, but, unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question when in fact the plaintiff supposed he was not selling that ox, but another, that they would find for the plaintiff. The jury, having found for the plaintiff, have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that, where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes by mistake the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistake the line of division cuts on his neigh-

bor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson v. York*, 5 Mass. 341, was still stronger than either of those above supposed. In that case, one Kenniston hired the defendant to take a cargo of wood from Burncoat island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board his vessel, and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*, 3 Lev. 37. Nor is the intent or design of the wrongdoer the criterion as to the form of remedy, for there are many cases in the books where, the injury being direct and immediate, trespass has been holden *tolie*, though the injury were not intentional, as in *Guille v. Swan*, 19 Johns. 381, where the defendant ascended in a balloon, which descended into the plaintiff's garden, and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damages done to the garden. In this case *SPENCER, C. J.*, said: "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See, also, 1 Poth. art. 1, § 1; 1 Sum. 219, 307.

The exceptions are overruled, and there must be

Judgment on the verdict.

(6 Wis. 320.)

DEXTER V. COLE.

(Supreme Court of Wisconsin. Jan. Term, 1853.)

1. TRESPASS TO PERSONAL PROPERTY — INTENT—MISTAKE.

To maintain trespass *de bonis asportatis*, actual forcible dispossession of property is not necessary; any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, will constitute trespass, though there was no wrongful intent, and the property was taken accidentally or by mistake.

2. SAME.

Plaintiff's sheep, running at large in the highway, became mixed with sheep which defendant was driving to market. Defendant separated all but four of them, which he drove to market with his flock. *Held*, that he was liable in trespass.

Error to circuit court, Milwaukee county.

Action of trespass by D. H. Dexter against James Cole for taking and driving

away 22 sheep, the property of plaintiff. On the trial before a justice of the peace and a jury, it appeared that plaintiff's sheep, running at large in the highway, became mixed with a larger flock which defendant was driving to market; whereupon defendant drove the whole flock into a yard to separate them, and threw out a number which he did not claim, and drove the rest to market and slaughtered them. The evidence tended to show (and it appeared from the verdict that the jury so found) that four of plaintiff's sheep remained in the flock, and were slaughtered with the rest. The judgment for plaintiff was reversed upon *certiorari*. Plaintiff sued out a writ of error.

James H. Paine & Son, for plaintiff in error. *Butler, Buttrick & Cottrill*, for defendant in error.

COLE, J. We have no doubt but that the action of trespass would lie in this case. In driving off the sheep the defendant in error, without doubt, unlawfully interfered with the property of Dexter; and it has been frequently decided that, to maintain trespass *de bonis asportatis*, it was not necessary to prove actual, forcible dispossession of property; but that evidence of any unlawful interference with, or exercise of acts of ownership over, property,

to the exclusion of the owner, would sustain the action. *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Metc. (Mass.) 27; *Philips v. Hall*, 8 Wend. 610; *Morgan v. Varick*, Id. 587; *Wintringham v. Lafoy*, 7 Cow. 735; *Reynolds v. Shuler*, 5 Cow. 325; 1 Chitty, Pl. (11th Amer. Ed.) 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Greenl. Ev. § 622; *Guille v. Swan*, 19 Johns. 381. There is nothing inconsistent with these authorities in the case of *Parker v. Walrod*, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.

Upon the other point in the case we think there was some evidence to support the verdict of the jury, and therefore the judgment of the justice should not be reversed because the proof was insufficient. It was the province of the jury to weigh the evidence, and determine what facts were established by it; and the county court ought not to reverse the judgment, because the proof was not sufficient in its opinion to justify the finding of the jury.

The judgment of the county court is therefore reversed, and the judgment of the justice affirmed.

(See, also, *Ely v. Ehle*, 3 N. Y. 507; *Haythorn v. Rushforth*, 19 N. J. Law, 160; *Kirk v. Gregory*, 1 Exch. Div. 55; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Gilman v. Emery*, 54 Me. 460; *Bruch v. Carter*, 32 N. J. Law, 554; *Burgess v. Graffam*, 18 Fed. Rep. 251; *Welsh v. Bell*, 32 Pa. St. 12; *Stanley v. Gaylord*, 1 Cush. 536.)

II. IS AN INJURY TO THE RIGHT OF POSSESSION.

(13 Me. 236.)

LUNT *et al.* v. BROWN.

(*Supreme Judicial Court of Maine*. May Term, 1836.)

1. TRESPASS TO PERSONAL PROPERTY—POSSESSION OR RIGHT TO POSSESSION.

A person cannot maintain trespass for taking personal property, unless at the time of the taking he had either actual or constructive possession, or a right to the immediate possession.

2. SAME.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time.

Exceptions from court of common pleas.

Action of trespass by Johnson Lunt and S. Lunt against Royal Brown for taking plaintiffs' mare. Plaintiffs had purchased the mare of one Winn, and had agreed that Winn should keep her "until grazing time;" and while she was in Winn's possession under such agreement she was taken by defendant, a deputy-sheriff, under an execution against Winn. The court instructed the jury that on such facts plaintiffs could not recover, and the verdict was for defendant. Plaintiffs alleged exceptions.

Mr. Bontelle, for plaintiffs. *Mr. Wells*, for defendant.

WESTON, C. J. Regarding the right of property in the mare in controversy to

have been in the plaintiffs, with a right of pre-emption only in Winn, as whose property she was taken by the defendant, the officer, the case finds that, by the agreement between the plaintiffs and Winn, the latter was to keep her until grazing time. She was taken by the officer in March, before the time of grazing. And this is the only proof of trespass upon which the plaintiffs rely to maintain their action. Trespass is a remedy afforded by law for an injury done to the plaintiffs' possession. They must show possession, actual or constructive, or an immediate right of possession.

In *Ward v. Macauley*, 4 Term R. 480, the plaintiff had let to Lord Montfort a ready furnished house, and the lease contained a schedule of the furniture. Pending the lease, the defendants, sheriffs of Middlesex, seized part of the furniture on execution against Lord Montfort. Trespass was held not to lie against the defendants, because the plaintiff had neither possession nor a right of possession at the time. The same doctrine was recognized in *Putnam v. Wyley*, 8 Johns. 337, and in *Clark v. Carlton*, 1 N. H. 110.

As the plaintiffs had neither possession nor the right of possession at the time of the alleged trespass, we are satisfied, on this ground, that the judge below was warranted in instructing the jury that the action was not maintained. We accordingly overrule the exceptions taken

by the counsel for the plaintiffs. It has become unnecessary, therefore, to consider those taken for the defendant, as, if they are overruled, the plaintiffs cannot prevail.

Judgment for defendant.

(See, also, *Billingsley v. White*, 59 Pa. St. 469; *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. Rep. 360; *Muggridge v. Eveleth*, 9 Metc. (Mass.) 233; *Dufour v. Anderson*, 95 Ind. 302; *Staples v. Smith*, 48 Me. 470.)

CONVERSION OF PERSONAL PROPERTY.

I. WHAT CONSTITUTES CONVERSION.

(68 N. Y. 522.)

LAVERTY V. SNETHEN.

(Court of Appeals of New York. Feb. 20, 1877.)

1. CONVERSION — DISPOSAL BY AGENT OF PROPERTY OF PRINCIPAL.

Where an agent parts with the property of his principal in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion.

2. SAME.

Plaintiff, holding a promissory note payable to his order, indorsed the same, and delivered it to defendant to negotiate for him, with instructions not to let the note go out of his hands without receiving the money for it; and defendant gave a receipt stating that the note was received for negotiation, and was to be returned the next day, or the avails thereof. Defendant delivered the note to a third person, who promised to negotiate it, and return the proceeds. The latter, after negotiating the note, appropriated the proceeds. *Held*, that the act of defendant was an unlawful interference with the note, and amounted to a conversion thereof.

Appeal from court of common pleas of the city and county of New York, general term.

Action by William K. Laverty against Worthington G. Snethen for the conversion of a promissory note, the property of plaintiff, made by one Holly, payable to plaintiff's order. The action was brought in the marine court of the city of New York. Plaintiff obtained a verdict, and the judgment entered thereon was affirmed on appeal by the general term of the marine court, and, on a further appeal, by the general term of the court of common pleas. From the judgment of the common pleas, defendant appealed.

James C. Carter, for appellant. *Samuel Hand* and *Patterson & Major*, for respondent.

CHURCH, C. J. The defendant received a promissory note from the plaintiff, made by a third person, and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day, or the avails thereof. The plaintiff testified, in substance, that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote

about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that, if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available. Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient. The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of *assumpsit*, or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. *Bouv. Law Dict. tit. "Conversion."* *SAVAGE, C. J.*, in *Spencer v. Blackman*, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods." In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury) not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful,

because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had a right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property, which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion; and the authorities, I think, sustain this conclusion by a decided weight of adjudication. A leading case is *Syeds v. Hay*, 4 Term R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them, and paying the wharfage. BUTLER, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never, to my knowledge, been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed.

In *Spencer v. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watch-maker. He put it into the possession of a watch-maker, when it was levied upon by virtue of an execution, not against the owner, and it was held to be a conversion. SAVAGE, C. J., said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watch-maker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 103. So when a factor in Buffalo was directed to sell wheat at a specified price, on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that, in legal effect, it was a conversion. *Scott v. Rogers*, 31 N. Y. 676. See, also, *Addison on Torts*, 310, and cases there cited.

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson*, 3 Taunt. 117, and *Sarjeant v. Blunt*, 16 Johns. 73, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the agent or broker did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property,—a distinction which, in a practical sense, may seem technical, but is founded probably upon the distinction

between an unauthorized interference with the property itself and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case, *SPENCER, J.*, distinguished it from *Syeds v. Hay*, supra. He said: "In the case of *Syeds v. Hay*, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action; but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarmain*, 2 Mees & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did, and appropriated the avails. PARKE, B., said: "The defendant did nothing with the bill which he was not authorized to do." So in *Cairnes v. Blecker*, 12 Johns. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris v. Simpson*, 21 Wend. 610, *Bronson, J.*, lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property, contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor." The result of the authorities is that, if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. *Boyce v. Brockway*, 31 N. Y. 490. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not objected to not only, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. Under these circumstances,

it must be deemed to have been waived, and is not available upon appeal.

But if an exception had been taken, I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return the note or money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and, if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it?

There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although, if they had not been given, a wider field of inquiry might have been opened. A promissory note passes from hand to hand, and a *bona fide* holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been in some form presented at the trial. In a moral sense, the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the fact found by the jury renders him liable in this action. The judgment must be affirmed. All concur.

Judgment affirmed.

(45 N. J. Law, 515.)

FROME v. DENNIS.

(Supreme Court of New Jersey. Nov. Term, 1883.)

1. CONVERSION—WHAT ACTS CONSTITUTE.

To constitute a conversion, there must be acts amounting to a repudiation of the owner's right in the property, or an exercise of ownership over it inconsistent with such right, or some act done which destroys or changes the quality of the property.

2. SAME—INTENT—KNOWLEDGE OF OWNERSHIP.

A person who, having no knowledge of the ownership of property, borrows it of the person having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, is not liable for a conversion, in an action by the true owner.

3. SAME—DEMAND BY OWNER AND REFUSAL.

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.

Certiorari to court of common pleas, Warren county.

Action of trover by Thomas P. Frome against Andrew J. Dennis for the alleged conversion of a certain plow.

Argued before DIXON and PARKER, JJ.

L. Dewitt Taylor, for plaintiff. George A. Angle, for defendant.

DIXON, J. In August, 1879, the plaintiff left his plow on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plow being still there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow

of Hibler to plow a field, supposing the plow to be Hibler's, and, having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use, and the return of the plow or its value; and, the defendant not complying, the plaintiff brought an action of trover for the plow. The justice before whom the suit was instituted, and the common pleas on appeal, each gave judgment for the plaintiff for the value of the plow. The judgment of the pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant. In order to maintain an action of trover, it is necessary to prove an act of conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice DEPUE in *Woodside v. Adams*, 30 N. J. Law, 417, in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel." This subject has quite recently received considerable discussion in the exchequer chamber and house of lords of England, in *Fowler v. Hollins*, L. R. 7 Q. B. 616, and L. R. 7 H. L. 757. The facts upon which the court finally settled as the basis of decision made the case a plain one of conversion. They were that one Bayley had fraudulently come into possession of 13 bales of cotton belonging to the plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Micholls & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter; and in examining the goods, receiving them from Bayley, and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice BRETT, in both tribunals, and he insisted, with great force and clearness, upon a negative response. BYLES, J., and KELLY, C. B., expressly concurred in this opinion, and the other judges in the exchequer chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the house of lords Mr. Justice BLACKBURN expressed his opinion that the defendant was liable, because he both entered into a contract with Bay-

ley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion in the property in the goods to Micholls & Co., that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour, and return the flour to the person who brought the grain, before he heard of the true owner. Under the definition of Mr. Justice DEPUE, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron CLEASBY, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view that he was a broker merely. "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice GROVE advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron AMPHLETT concurred with BRETT. Lord CHELMSFORD, Chancellor CAIRNS, and Lords HATHERLEY and O'HAGAN advised for the plaintiff, in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i. e.*, ownership, over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In a very late case in Massachusetts, (*Spooner v. Manchester*, 133 Mass. 270,) a similar view is expressed. FIELD, J., there says: "Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, * * * and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property that amounts to a conversion. Acts which themselves imply an assertion

of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not, in themselves, imply an assertion of title or of a right of such dominion over such property will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it. * * * Whether an act involving the temporary use, control, or detention of property implies an assertion of a right of dominion over it may well depend upon the circumstances of the case and the intention of the person dealing with the property." To the same effect is *Laverty v. Snethen*, 68 N. Y. 522.

In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plow. He received it for temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor, from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion. This being so, his subsequent failure to deliver the plow to the plaintiff on demand was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. *Ross v. Johnson*, 5 Burrows, 2825; *Bank v. Wheeler*, 48 N. Y. 492; *Magnin v. Dinsmore*, 70 N. Y. 410.

The plaintiff contends that the evidence on the part of the defendant as to his conversation with Hibler at the time of borrowing the plow was illegal. It was not, however. It being proper to show that the defendant came into possession of the plow, the declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, were admissible as part of the *res gestæ*. *Luse v. Jones*, 39 N. J. Law, 707; *Hunter v. State*, 40 N. J. Law, 495.

The judgment below should be reversed.

(14 R. I. 39.)

FREEMAN *et al.* v. BOLAND.

(*Supreme Court of Rhode Island. Dec. 5, 1882.*)

CONVERSION—WHAT ACTS CONSTITUTE—INFANCY.
A person, though an infant, who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.

Exceptions from court of common pleas. Action of trover by Freeman & Francis against Frank P. Boland for the alleged conversion of a horse and buggy. Verdict and judgment for plaintiffs. Defendant alleged exceptions.

John D. Thurston, for plaintiffs. *George J. West*, for defendant.

DURFREE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defense to an action *ex delicto*, for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandon-

ing it, the bailment being thus determined. The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne v. Wiley*, 23 Vt. 355; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch, 226; *Green v. Sperry*, 16 Vt. 390; *Campbell v. Stakes*, 2 Wend. 137; *Add. Torts*, § 1314. We understand that the defendant does not ask us to decide the questions raised by the other exceptions, the exceptions being waived.

Exceptions overruled.

(See, also, *Forbes v. Railroad Co.*, 133 Mass. 154; *Spooner v. Manchester*, Id. 270; *Pease v. Smith*, 61 N. Y. 477; *Bank v. Wheeler*, 48 N. Y. 492; *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. Rep. 433, and 5 N. E. Rep. 903; *Chapman v. Cole*, 12 Gray, 141; *Hollins v. Fowler*, L. R. 7 H. L. 757; *First Nat. Bank v. Northern R. Co.*, 58 N. H. 203.)

II. IS AN INJURY TO THE RIGHT OF POSSESSION.

(1 Strange, 505.)

ARMORY V. DELAMIRIE.

(*Court of King's Bench*. Hilary Term, 1722.)

1. CONVERSION—RIGHT TO POSSESSION—FINDER MAY MAINTAIN TROVER.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.

2. MASTER AND SERVANT—LIABILITY TO THIRD PERSONS.

The master is liable for a conversion by his apprentice of property taken by the latter in the line of his employment.

3. SAME—MEASURE OF DAMAGES.

A chimney sweep, finding a jewel, delivered it to a goldsmith to ascertain what it was, and the latter took out the stones and returned the socket. *Held*, in an action of trover, that unless defendant produced the stones, the strongest presumption was against him, and the measure of damages should be the value of the finest stones which would fit into the socket.

Before PRATT, C. J., *at nisi prius*.

The plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the defendant's shop, (who was a goldsmith,) to know what it was, and delivered it into the hands of the apprentice, who, under pretense of weighing it, took out the stones; and, calling to the master to let him know if it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the

master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury that, unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

(7 Term R. 9.)

GORDON V. HARPER, (in part.)

(*Court of King's Bench*. Nov. 11, 1796.)

1. CONVERSION—RIGHT TO POSSESSION—WHO MAY MAINTAIN TROVER.

Trover will not lie for the conversion of personal property unless at the time of the conversion the possession or right to the immediate possession was in plaintiff.

2. SAME—LEASED PROPERTY.

The owner of personal property leased to another cannot maintain trover for a conversion pending the demise.

Case reserved on verdict subject to opinion of court.

Action of trover by Gordon against Harper for the conversion of household goods taken by Harper as sheriff, and sold under a writ against one Barret in favor of one Broomhead. Barret had sold the goods to plaintiff, who had leased them to one Briscoe, in connection with the house where they were found, and they were taken by defendant from Briscoe's possession before the expiration of his lease. The lease had not expired at the time of the trial. A verdict was found for plaintiff subject to the opinion of the court on the above facts.

Mr. Burrough, for plaintiff. Mr. Best, contra.

ASHURST, J. I have always understood the rule of law to be that, in order to maintain trover, the plaintiff must have a right of property in the thing, and a right of possession, and that, unless both these rights concur, the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but, supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is whether the trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him, for he declares that, being possessed, etc., he lost the goods. He is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession, as against a tortfeasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession, and he would be a trespasser if he took the

goods from the tenant. Then, by what authority can he recover them from any other person during the term? It is laid down in some of the books (1 Bac. Abr. 45; 5 Bac. Abr. 257; 2 Com. Dig. tit. "Detinue, D") that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent; but certainly it may be said to be a good criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And, if not, it is a strong argument to show that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward v. Macauley*, 4 Term R. 489; but the only question there was whether trespass would lie under these circumstances, and it was not necessary to determine how far trover might be maintained. It appears now very clearly, upon examining that point, that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and, when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

Postea to defendant.

(See, also, *Stowell v. Otis*, 71 N. Y. 36; *Winship v. Neale*, 10 Gray, 382; *Vining v. Baker*, 53 Me. 544; *Castor v. McShaffery*, 48 Pa. St. 437; *Bartlett v. Hoyt*, 29 N. H. 317; *Bowen v. Fenner*, 40 Barb. 333; *Jeffries v. Railroad Co.*, 5 El. & Bl. 802; *Shaw v. Kaler*, 106 Mass. 443; *Manders v. Williams*, 4 Exch. 339.)

III. CONVERSION BY JOINT OWNER.

(21 Pick. 559.)

WELD v. OLIVER, (in part.)

(*Supreme Judicial Court of Massachusetts.*
March 25, 1839.)

CONVERSION BY TENANT IN COMMON.

Where one tenant in common of personal property sells and delivers the entire property as exclusively his own, it amounts to a conversion, for which his co-tenant can maintain trover.

Case reserved upon agreed facts.

Action of trover by William F. Weld against James Oliver for an alleged conversion of 7,870 bushels of salt. The salt was owned in equal undivided shares by plaintiff and one Greene, and was sold to defendant by Greene in payment of shares of corporate stock bought by Greene. Plaintiff, discovering the sale, forbade defendant disposing of the salt, but defendant thereafter sold it as his own in small lots. Plaintiff contended that by the sale by Greene plaintiff and defendant became tenants in common of such salt, and that the sale by defendant of the salt as exclusively his own was a conversion, and the

case was stated for the opinion of the court.

C. G. Loring, F. C. Loring, and Mr. Dehon, for plaintiff. *Choate & Crowninshield*, for defendant.

DEWEY, J. The principal question in the present case is whether an action of trover will lie by one tenant in common of personal chattels against his co-tenant upon no other evidence of conversion by him than a sale and delivery of the entire property as exclusively his own. I am not aware that this question has been distinctly settled by any adjudication of this court. The case of *Melville v. Brown*, 15 Mass. 82, which has sometimes been supposed to sanction the doctrine that such a sale was a conversion for which trover would lie, was considered by the court as maintainable upon principles peculiar to itself, and of a more limited character; it being a case of an abuse of an authority in law, under an attachment on mesne process, and subsequent sale on execution by a sheriff. The elementary books generally state the rule to be that one tenant

in common cannot maintain trover against his co-tenant unless there has been a destruction of the property; and in some of them it is expressly affirmed that a sale by one co-tenant of the entire property will not amount to a conversion. The cases cited to sustain this latter position are very limited, and not of so decisive a character as to put this point at rest. On the contrary, the question may be considered in this commonwealth as an open one, and to be decided upon what may seem to be sound principle.

The authority of the few English cases usually cited as favoring the doctrine that a sale in such cases is not a conversion is certainly much weakened by the case of *Barton v. Williams*, 5 Barn. & Ald. 395, where it seems to be distinctly stated by two of the learned judges before whom the cause was heard that a sale of the whole property by one of two tenants in common is a conversion. The case, however, presented other questions, and, in the final disposition of it, this point does not seem to have been settled.

Upon recurring to the origin of the doctrine so frequently stated, that one tenant in common cannot maintain trover against his co-tenant unless there has been a destruction by him of the property thus holden in common, I think it will be found to have been originally asserted with reference to the right of one tenant in common to sue his co-tenant, in an action of trover, for the exclusive use and possession of the common property, and the denying to the other any participation in the same; and, when thus applied, it is entirely correct, upon the familiar principle that the possession of one co-tenant is the possession of both, and he who has the present possession cannot be ousted. It is very clear that one tenant in common cannot maintain an action of trover against his co-tenant for the mere act of withholding from him the use of a chattel, the rights of both being such that he who has the possession cannot be guilty of a conversion by retaining it. Nor can one tenant in common object to the mere sale by the other of the interest of the vendor in the common property, and a delivery over of the chattel to the purchaser. Such a right results from the nature of the relation between the parties, and to this inconvenience each must be subject; the mere change of possession, under such circumstances, being no conversion.

But the question arises whether this be not the limit beyond which, if one co-tenant passes, he subjects himself to an action by the other co-tenant for the conversion of his share of the property. The ordinary evidence of conversion is the unlawful taking or detention of goods from the possession of the true owner; but it is equally true that he who undertakes to dispose of my goods as his own property thereby subjects himself to an action of trover. May not the assumption of property in and a sale of my undivided moiety by my co-tenant be equally a conversion by him of the moiety belonging to me, as the sale by a stranger of an article in which I had the entire interest be the conversion of the whole property by the stranger?

The objection to holding a sale by one tenant in common of the interest of his co-tenant to be a conversion, as stated in *Bac. Abr. "Trover"*, is that such a sale only passes the interest of the vendor, and the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale. But the fact that the original owner is not divested of his legal property by force of the sale is equally true in the ordinary cases of the conversion of the whole property by a stranger; but this is not deemed a bar to an action of trover, if the owner elects that mode of redress, rather than to reclaim the specific property. To constitute a conversion of the whole property by a stranger requires only an assumption of authority over, and an actual sale of, the property, and it is not necessary that the legal interest should pass by the sale.

We do not perceive any sufficient reason for taking a distinction between the cases of an unlawful sale of a moiety or the entire estate; and it seems to us, in either case, the assuming an authority to sell, and the making the actual sale, of the interest of another, under a claim of title in the vendor, may properly be taken to be a conversion for which an action of trover will lie. We are sustained in this opinion by an early decision of the supreme court of the state of New York in the case of *Wilson v. Reed*, 3 Johns. 175; and the same principle has also been subsequently recognized in the cases of *Hyde v. Stone*, 9 Cow. 230, and *Gilbert v. Dickerson*, 7 Wend. 449.

* * * * *

Judgment for plaintiff.

(See, also, *Dryckman v. Valiente*, 42 N. Y. 549; *Wheeler v. Wheeler*, 33 Me. 347; *White v. Phelps*, 12 N. H. 332; *Browning v. Cover*, 103 Pa. St. 595; *Lewis v. Clark*, 59 Vt. 363, 8 Atl. Rep. 153; *Davis v. Lottich*, 46 N. Y. 395; *Lobdell v. Stowell*, 51 N. Y. 70.)

IV. DEMAND AND REFUSAL AS EVIDENCE OF CONVERSION.

(9 Barb. 176.)

ESMAY V. FANNING.

(*Supreme Court of New York*. July 1, 1850.)

1. CONVERSION—BAILMENT—RETURN OF PROPERTY TO THIRD PERSON.

A bailee of a chattel who fails to restore it to the rightful owner, but delivers it to another not entitled to receive it, though under an honest

mistake of fact, is liable in trover for its conversion.

2. SAME.

Plaintiff loaned his carriage to defendant, who took the same from the livery stable of another, where it was stored for plaintiff. *Held*, that a return to such livery stable, after the keeper had ceased to be plaintiff's agent, amounted to a conversion.

3. SAME—NECESSITY OF DEMAND.

Where personal property comes lawfully into the possession of a person other than the owner, a demand is necessary before trover can be maintained for its conversion, unless such person has committed some wrongful act in connection therewith which amounts to an actual conversion.

Appeal from judgment on report of referee.

Action of trover by Esmay against Fanning for the conversion of a carriage. It appeared at the trial before a referee that the carriage was loaned by plaintiff to defendant, who got the same from the livery stable of one Crocker, who was keeping it for plaintiff; and that it was returned by defendant to said Crocker as the agent of plaintiff, but that Crocker was not the agent of the plaintiff to receive the carriage; that Crocker notified plaintiff of its return to him, and plaintiff refused to have anything to do with it, and thereafter demanded it of defendant, and then brought this action. The referee found for plaintiff, and defendant appealed.

F. S. Edwards, for appellant. *H. C. Van Vorst*, for respondent.

WILLARD, J. The gist of this action is the conversion and deprivation of the plaintiff's property, and not the acquisition of property by the defendant. *Keyworth v. Hill*, 3 Barn. & Ald. 685. The general requisites to maintain the action are property in the plaintiff; actual possession or a right to the immediate possession thereof; and a wrongful conversion by the defendant. *Conway v. Bush*, 4 Barb. 565. The plaintiff's title was not disputed in this case. The issue is on the conversion; or, in other words, it is whether the defendant redelivered the carriage to the plaintiff or his agent before the commencement of this suit. The plaintiff alleges a refusal to redeliver it, and the defendant avers that he did redeliver it. The referee found the fact that the defendant did not redeliver the carriage to the plaintiff or his agent, and the proof is that Crocker, to whom the defendant did deliver the carriage, in November, 1846, was not, at that time, the agent of the plaintiff, or authorized to receive it. And there is no evidence that the plaintiff ever assented to that delivery. The question, therefore, becomes narrowed down to this, whether a bailee of a chattel is answerable in trover, on showing a delivery to a person not authorized to receive it. In *Devereux v. Barclay*, 2 Barn. & Ald. 702, it was held that trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery was occasioned by mistake only; and this court, in *Packard v. Getman*, 4 Wend. 613, held that the same action would lie against a common carrier who had delivered the goods by mistake to the wrong person. The same point was ruled by Lord Kenyon in *Youl v. Harbottle*, Peake, 49, and by the English common pleas in *Stephenson v. Hart*, 4 Bing. 476. If trover will lie against a common carrier or a warehouseman for a misdelivery, it can, under the like circumstances, be sustained against a bailee for hire or a

gratuitous bailee. It results, from the very obligation of his contract, that if he fails to restore the article to the rightful owner, but delivers it to another person, not entitled to receive it, he is guilty of a conversion. *Story, Bailm.* § 414. The referee found as a fact that the carriage was not redelivered to the plaintiff, but was delivered to another person having no right to receive it. The evidence detailed in the case warranted that finding, and it cannot be disturbed by this court. We think the referee drew the right conclusion from that fact, and justly held the defendant liable for the value of the carriage.

As the parties all lived in the same city, the carriage should have been returned to the plaintiff, unless there was some agreement to the contrary. The fact that the carriage was stored by the plaintiff in Crocker's stable, at the time the defendant first received it, did not authorize him, under a contract to return it to the plaintiff, to deliver it to Crocker, who had ceased to be the plaintiff's agent. The place of delivery of the carriage was the plaintiff's residence. *Barns v. Graham*, 4 Cow. 452; *Story, Bailm.* §§ 257, 261, 265. A delivery elsewhere, without authority, was a conversion. We have not adopted the civil law, which allowed the bailee, in case no place was agreed on, to restore the property to the place from which he took it. *Id.* § 117.

It was not necessary in this case to prove a demand and refusal. Had the carriage remained in the defendant's possession, no action could have been maintained by the plaintiff against the defendant until it had been demanded, and the defendant had neglected or refused to return it. A demand and refusal are not a conversion, but evidence from which it can be inferred. A demand is necessary whenever the goods have come lawfully into the defendant's possession, unless the plaintiff can prove some wrongful act of the defendant in respect of the goods which amounts to an actual conversion. 2 *Leigh, N. P.* 1483; *Bates v. Conkling*, 10 Wend. 389; *Tomkins v. Haile*, 3 Wend. 406. As the delivery of the carriage by the defendant to Crocker instead of the plaintiff amounted to a conversion, proof of a demand and refusal was unnecessary. The testimony of Nichols, therefore, to prove a demand was immaterial; and the decision of the referee, refusing to permit the defendant to prove what he said at the time the demand was made, could have no influence on the result of the cause. Had a demand been necessary, the declaration of the defendant in answer to the demand would have been admissible, as well on the part of the defendant as of the plaintiff. The decision of the referee that a demand and refusal were admitted by the pleadings, whether right or wrong, worked no injury to the defendant.

A wide range was taken on the argument on the implied obligations resulting from the various kinds of bailments, and particularly with reference to the restoring the thing bailed to the bailor. But it seems unnecessary to discuss this subject in this case, because here there was an

express agreement to return the property to the plaintiff on request.

The judgment must be affirmed.

(14 R. I. 511.)

SINGER MANUFACTURING CO. v. KING.

(Supreme Court of Rhode Island. June 2, 1884.)

CONVERSION—DEMAND AND REFUSAL OF AGENT.

A bailee of a chattel, who has received the same in good faith from a person other than the owner, is not liable for conversion in refusing to deliver the same to the owner on demand until he has had time to satisfy himself in regard to the ownership; but where an agent, having received a chattel from a fellow-employee, who directed him not to deliver it to the owner until storage charges were paid, refused to deliver it to the owner on demand because the latter would not pay such charges, *held*, that the agent had no right to impose such a condition, and that his refusal to give up the chattel was a conversion.

Exceptions from court of common pleas.

Action of trover by the Singer Manufacturing Company against Patrick King for conversion of a sewing-machine. A verdict was returned for defendant. Plaintiff alleged exceptions.

Ziba O. Slocum, for plaintiff. *Albert D. Bean*, for defendant.

DURFEE, C. J. This is trover for the conversion of a sewing-machine belonging to the plaintiff company. The case was tried in the court of common pleas, and comes here on exceptions. The testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H. Harris, agent for the plaintiff, and that the defendant, who was agent for the American Sewing-Machine Company, though he had the machine, refused to deliver it until storage was paid for it, or until another machine belonging to the American Sewing-Machine Company, which the plaintiff had, was returned. The defendant testified that the machine was brought to him by one Conner, an employee of the American Sewing-Machine Company; that he was instructed to hold it for storage; and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing-Machine Company. It further appeared that the machine had been leased to a Mrs. Lynch by the plaintiff company; that Conner had received it from her, leaving a machine of the American Company in place of it; that he had carried it to Harris, and that Harris refused to receive it, saying that his company had no machines out which were then due; that he then carried it to the American Sewing-Machine Company, and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it, and that he had not authorized any one to store it with the American Company.

1. The court instructed the jury that if the defendant, when demand was made upon him, was the agent of the American Sewing-Machine Company, and was holding the machine under their orders, and not for himself, or under his own control, then the defendant would not be guilty. The plaintiff excepted.

2. The plaintiff asked the court to instruct the jury that the defendant would be guilty unless he told the plaintiff when the demand was made that he was holding the machine as servant of the American Sewing-Machine Company. The court refused so to instruct the jury, but did instruct them that the defendant's omission to give the information would not constitute a conversion, but would be evidence for them to consider in determining the question as to whether he was holding the machine as agent or not. The plaintiff excepted. The question is, were the instructions and the refusal to instruct correct?

Ordinarily, when one person has the chattel of another, it is his duty to deliver it to the owner or his agent on demand, and, if he refuses to do so, his refusal is evidence of a conversion. It is, however, only *prima facie* evidence, and may be explained. *Magee v. Scott*, 9 Cush. 148; *Robinson v. Burleigh*, 5 N. H. 225; *Dietus v. Fuss*, 8 Md. 148; *Green v. Dunn*, 3 Camp. 215; *Solomons v. Dawes*, 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership. *Carroll v. Mix*, 51 Barb. 212; *Lee v. Bayes*, 18 C. B. 599, 607; *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; *Coles v. Wright*, 4 Taunt. 198. In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it. *Mires v. Solebay*, 2 Mod. 242, 245; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Berry v. Vantries*, 12 Serg. & R. 89. But if, after having had an opportunity to confer with his master, he relies on his master's title, and absolutely refuses to comply with the demand, he will be liable for a conversion. *Lee v. Robinson*, 25 Law J. C. P. 249, 18 C. B. 599; 1 Add. Torts, § 475; *Greenway v. Fisher*, 1 Car. & P. 190; *Stephens v. Elwall*, 4 Maule & S. 259; *Perkins v. Smith*, 1 Wils. 323; *Gage v. Whittier*, 17 N. H. 312. The mere fact that he refuses for the benefit of his principal will not protect him. *Kimball v. Billings*, 55 Me. 147.

In the case at bar the defense is that the defendant, acting as agent of the American Sewing-Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem that he had received his instructions before the demand in anticipation of it. He was not a mere servant, but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires v. Solebay*, but from a fellow employee; and he may have known, indeed the evidence carries the impression that he did know, all the circumstances in regard to it, and nevertheless co-operated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such

was the fact, we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty, under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained.

We do not find any error in the instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for new trial. Exceptions sustained.

(See, also, *Gilmore v. Newton*, 9 Allen, 171; *Pease v. Smith*, 61 N. Y. 477; *Howitt v. Estelle*, 93 Ill. 218; *Galvin v. Bacon*, 11 Me. 28; *Dearbourn v. Bank*, 58 Me. 273; *Wykoff v. Stevenson*, 46 N. J. Law, 326; *Goodwin v. Wertheimer*, 99 N. Y. 143, 1 N. E. Rep. 404; *Edmunds v. Hill*, 133 Mass. 445.)

LIABILITY OF PUBLIC OFFICERS FOR OFFICIAL ACTS.

I. JUDICIAL OFFICERS.

(13 Wall. 335.)

BRADLEY v. FISHER.

(*Supreme Court of United States*. Dec. Term, 1871.)

1. JUDGE—LIABILITY FOR JUDICIAL ACTS.

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; although there is no such exemption where there is clearly no jurisdiction over the subject-matter, and such want of jurisdiction is known to the judge.

2. SAME — STRIKING NAME OF ATTORNEY FROM ROLL.

An order of the criminal court of the District of Columbia, made in 1867, recited that plaintiff, an attorney practicing in the court, threatened the presiding justice, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending, and directed that plaintiff's name be stricken from the roll of attorneys practicing in the court. *Held*, that the court, being at that time a separate and independent court, having general criminal jurisdiction, possessed the power to make such order; that the matters recited in the order were ample ground for the action of the court in making it; and that, though the court erred in not citing plaintiff before making such order, to show cause why it should not be made, and to afford him opportunity for explanation or defense or apology, such error, however it might have affected the validity of the act, did not make it any the less a judicial act; nor did it render the judge making the order liable in damages to plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

DAVIS and CLIFFORD, JJ., dissenting.

Error to the supreme court of the District of Columbia.

Action by Joseph H. Bradley against George P. Fisher for damages alleged to have been sustained by plaintiff "by reason of the willful, malicious, oppressive, and tyrannical acts and conduct" of defendant, as a judge, in making an order of court striking the name of plaintiff from the roll of attorneys. The jury found a verdict for defendant. To review the judgment entered thereon plaintiff brought a writ of error.

J. M. Harris and R. T. Merrick, for

plaintiff in error. *A. G. Riddle and W. A. Cook*, for defendant in error.

FIELD, J. In 1867 the plaintiff was a member of the bar of the supreme court of the District of Columbia, and the defendant was one of the justices of that court. In June of that year the trial of one John H. Suratt for the murder of Abraham Lincoln was commenced in the criminal court of the district, and was continued until the 10th of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the 2d of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect; but that the plaintiff, so far from accepting this explanation or disclaimer, had threatened the judge with personal chastisement. The plaintiff appears to have regarded this order of the criminal court as an order disbarring him from the supreme court of the District; and the whole theory of the present action proceeds upon that hypothesis. The declaration in one count describes the criminal court as one of the branches of the supreme court, and in the other count represents the order of the criminal court as an order removing the plaintiff from the

office of an attorney at law in the supreme court of the District; and it is for the supposed removal from that court, and the assumed damages consequent thereon, that the action is brought. Yet the criminal court of the District was at that time a separate and independent court, and as distinct from the supreme court of the District as the circuit court is distinct from the supreme court of the United States. Its distinct and independent character was urged by the plaintiff, and successfully urged, in this court, as ground for relief against the subsequent action of the supreme court of the District, based upon what had occurred in the criminal court; and, because of its distinct and independent character, this court held that the supreme court of the District possessed no power to punish the plaintiff on account of contemptuous conduct and language before the criminal court or in the presence of its judge. By this decision, which was rendered at the December term of 1868, (*Ex parte Bradley*, 7 Wall. 364,) the groundwork of the present action of the plaintiff is removed. The law which he successfully invoked, and which protected him when he complained of the action of the supreme court of the District, must now equally avail for the protection of the defendant, when it is attempted to give to the criminal court a position and power which were then denied. The order of the criminal court, as it was then constituted, was not an order of the supreme court of the District, nor of one of the branches of that court. It did not, for we know that in law it could not, remove the plaintiff from the office of an attorney of that court, nor affect his right to practice therein.

This point is distinctly raised by the special plea of the defendant, in which he sets up that at the time the order complained of was made, he was regularly and lawfully holding the criminal court of the District, a court of record, having general jurisdiction for the trial of crimes and offenses arising within the District, and that the order complained of was an order of the criminal court, made by him in the lawful exercise and performance of his authority and duty as its presiding justice, for official misconduct of the plaintiff, as one of its attorneys in his presence; and upon this plea the plaintiff joined issue. The court below, therefore, did not err in excluding the order of removal as evidence in the cause, for the obvious reason that it did not establish, nor tend to establish, the removal of the plaintiff by any order of the defendant, or of the court held by him, from the bar of the supreme court of the District. And the refusal of the court below to admit evidence contradicting the recitals in that order could not be the ground of any just exception, when the order itself was not pertinent to any issue presented. Nor is this conclusion affected by the act of congress passed in June, 1870, nearly three years after the order of removal was made, and nearly two years after the present action was commenced, changing the independent character of the criminal court, and declaring that its judgments, decrees, and orders should be

deemed the judgments, decrees, and orders of the supreme court of the District. (16 St. at Large, 160.) If the order of removal acquired from this legislation a wider scope and operation than it possessed when made, the defendant is not responsible for it. The original act was not altered. It was still an order disbarring the plaintiff only from the criminal court, and any other consequences are attributable to the action of congress, and not to any action of the defendant.

But this is not all. The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the criminal court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. (*Justice MAYNE*, in *Taffe v. Downes*, reported in a note to 3 Moore, P. C. 41.)

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor KENT observes, "a deep root in the common law." *Yates v. Lansing*, 5 Johns. 291.

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker*, reported by Coke, in 1608, (12 Coke, 25,) where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself; and it was observed that, if they were required to answer otherwise, it would "tend to the scandal and subversion

of all justice, and those who are the most sincere would not be free from continual calumniations." The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. If, upon such allegations, a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show, to the judge before whom he might be summoned by the losing party, —and that judge, perhaps, one of an inferior jurisdiction,—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he, in his turn, might also be held amenable by the losing party.

Some just observations on this head of the late Chief Justice SHAW will be found in *Pratt v. Gardner*, 2 Cush. 68, and the point here was adjudged in the recent case of *Fray v. Blackburn*, 3 Best & S. 576, by the queen's bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was that it was bad in not alleging malice. Judgment

on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice CROMPTON replied: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;" and the leave was refused.

In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, and suspended or removed from office. In some states they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature.

In the case of *Randall v. Brigham*, 7 Wall. 523, decided by this court at the December term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the superior court of Massachusetts, from the bar of that state; and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily, and oppressively. In considering the questions presented, the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that, if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remain unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but

to avoid the expression of a contrary doctrine.

In the present case we have looked into the authorities, and are clear from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction, and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of king's bench in *Ackerley v. Parkinson*, 3 Maule & S. 411. In that case an

action was brought against the vicar-general of the bishop of Chester, and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin; the citation issued to him being void, and having been so adjudged. The question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord ELLENBOROUGH observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*." Mr. Justice BLANC said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attended the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had nor had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action, while exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The criminal court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed

by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession; and except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property; and even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself, and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired. But, on the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice GIBSON in the Case of Anstin, 5 Rawle, 204, "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the

deliberation of the bench by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practiced but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to sniters and the public would be the same; and, whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll."

The order of removal complained of in this case recites that the plaintiff threatened the presiding justice of the criminal court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending. The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether, under any circumstances, the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant; and, if the matters recited are taken as true, there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offense of such gravity would soon find himself a subject of pity, rather than of respect.

The criminal court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must therefore be affirmed, and it is so ordered.

Judgment affirmed.

DAVIS, J., with whom concurred CLIFFORD, J., (*dissenting*.) I agree that judicial officers are exempt from responsibility in a civil action for all their judicial acts in respect to matters of controversy within their jurisdiction. I agree, further, that judges of superior or general authority are equally exempt from liability, even when they have exceeded their jurisdiction, unless the acts complained of were

done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged, not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances. I also dissent from the opinion of the majority of the court for the reason that it discusses the merits of the controversy, which, in the state of the record, I do not consider open for examination.

(3 Denio, 117.)

WEAVER V. DEVENDORF *et al.*

(*Supreme Court of New York. May Term, 1846.*)

1. OFFICERS—LIABILITY FOR JUDICIAL ACTS.

No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it, if he had jurisdiction of the particular case, and was authorized to determine it.

2. SAME—ASSESSORS OF TAXES—LIABILITY FOR ERRONEOUS ASSESSMENT.

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action, by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or deduction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.

Error to court of common pleas, Herkimer county.

Action on the case by Weaver against Devendorf and others, brought before a justice of the peace. The declaration alleged that defendants, being assessors of the town of Frankfort for a certain year, assessed plaintiff's taxable property at \$1,800, and in so doing refused to allow him the benefit of the exemption to which he was entitled as a minister of the gospel; that they estimated his property at a higher rate than that of other taxable inhabitants of the town, and refused to make a deduction from his personal property for debts owing by him, though he proved to their satisfaction that he owed such debts; by means of which he was taxed and obliged to pay a large amount, etc. In some of the counts defendants' conduct was charged to have been willful and corrupt, and in others careless and negligent. Defendants pleaded the general issue. On trial, the justice rendered judgment for plaintiff, which, on *certiorari*, was reversed by the common pleas. To review the judgment of the common pleas plaintiff brought a writ of error.

G. B. Judd, for plaintiff in error. *E. T. Marsh*, for defendants in error.

BEARDSLEY, J. Although the plaintiff may have been a minister of the gospel, still his estate, beyond \$1,500 in value, was equally subject to taxation with that of other persons. 1 Rev. St. pp. 387, 388, §§ 1, 4, 5. It is not suggested that his property was short of that amount, so that he

was wholly exempt from taxation, and upon the evidence that could not be urged with a show of plausibility. We need not, therefore, inquire what the rule in such a case would be. This plaintiff appears to have been worth some five or six thousand dollars; his real estate in the town where he resided, and in which the question arose, being somewhat more than \$2,000 in value. It was therefore not a case in which the property of the plaintiff was totally exempt from taxation, and over which the defendants had no jurisdiction whatever, but one in which they were authorized and required by law to make an assessment of the property, even if the owner was a minister of the gospel.

The grounds of complaint on the part of the plaintiff, as far as I can collect them from the return, were twofold—*First*, that no allowance or deduction was made, in assessing his property, on account of his being a minister; and, *secondly*, that his property was assessed at a higher rate than that of others, so that he was thereby compelled to bear an undue proportion of the public burdens. There is no evidence in the case, if the fact were material, to show that the defendants did not allow the exemption claimed to the extent of \$1,500; and if the plaintiff was a minister, and entitled to that deduction, we cannot presume against the defendants, who were public officers, that they violated their duty in omitting to make the proper allowance. The presumption is that public officers do their duty, and upon this return it is rather to be inferred that the deduction of \$1,500 was made. The plaintiff was assessed to the amount of \$1,800 for real and personal property, and which may have been the residue after deducting \$1,500, a conclusion very well warranted by the evidence. But, in my view of the case, it is not at all material whether the \$1,500 were or were not deducted by the defendants, or whether the plaintiff's property was assessed at a higher rate than that of others, for in neither event can this action be sustained.

The defendants were assessors of Frankfort, where the plaintiff resided, and as such had jurisdiction over all taxable inhabitants of that town. His real estate in the town exceeded \$1,500 in value. It was therefore plainly a case in which the defendants had jurisdiction over the property, as well as the person, of the plaintiff; and it was their imperative duty to ascertain, as far as practicable, the taxable property of the plaintiff, and estimate its true value according to their best information, belief, and judgment. 1 Rev. St. pp. 389, 390, tit. 2, arts. 1, 2. In some particulars the duty of assessors is undoubtedly ministerial; but, in fixing the value of taxable property, the power exercised is in its nature purely judicial. With the exception of real and personal estate, the value of which is sworn to as authorized by law, (Id. pp. 392, 393, §§ 15, 16, 22,) the residue is to be valued, estimated, and determined by the assessors. Id. pp. 393, 394, §§ 17, 26. This is emphatically a judicial act. The writ of *certiorari*, at common law, lies only to officers exercising judicial powers, and to remove proceed-

ings of that character. *People v. Mayor, etc.*, 2 Hill, 9, 11; *In re Mount Morris Square, etc.*, Id. 14, 21, 22. Yet all the authorities agree that this writ lies to remove an assessment, although, as the allowance of the writ is discretionary, the court, on grounds of public policy and convenience, will ordinarily refuse the writ in cases of this nature. *People v. Supervisors*, 15 Wend. 198; *People v. Supervisors*, 1 Hill, 195; 2 Hill, *supra*. The act complained of in this case was therefore a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and, acting as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff, or of any one else; and, surely, it will not be pretended they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers,

whatever name they may bear in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable. I shall not attempt to state any of them in detail, but will content myself by referring generally to some of the elementary works and adjudged cases, which will be found fully to sustain the principles I have stated: *Brown, Act. Law*, 191-200; 1 Chit. Pl. (7th Amer. Ed.) 89, 209, 210; 2 Saund. Pl. & Ev. 613; 2 Starkie, Ev. (7th Amer. Ed.) 586, 588, 1111, 1112; *Broom, Leg. Max.* 40, 48; *Yates v. Lansing*, 5 Johns. 282, affirmed in error, 9 Johns. 396; *Cunningham v. Bucklin*, 8 Cow. 178; *Easton v. Calendar*, 11 Wend. 90; *Wilson v. Mayor, etc.*, 1 Denio, 598; *Stowball v. Ansell, Comb.* 116; *Garrett v. Ferrand*, 6 Barn. & C. 611; opinion of *NORTH, C. J.*, in *Barnardiston v. Soame*, in the exchequer chamber, 6 State Tr. 1063, and in 1 East, 568, note; opinion of *BURROUGH, J.*, in *Duke of Newcastle v. Clark*, 8 Taunt. 602; *Case of Floyd & Barker*, 12 Coke, 23; *Evans v. Foster*, 1 N.H. 377; *Dicas v. Lord Brougham*, 6 Car. & P. 249; *Gwinne v. Pool*, Lutw. 290; *Brittain v. Kinnaird*, 1 Brod. & B. 432; *Bigelow v. Stearns*, 19 Johns. 39; *Doswell v. Impey*, 1 Barn. & C. 163.

The judgment of the common pleas should be affirmed.

Judgment affirmed.

(See, also, *Lange v. Benedict*, 73 N. Y. 12; *Piper v. Pearson*, 2 Gray, 120; *Clarke v. May*, Id. 410; *Grove v. Van Duyn*, 44 N. J. Law, 654; *Jones v. Booth*, 56 Cal. 65; *Gas-Light Co. v. Donnelly*, 93 Megoun, 44 Mo. 491; *Friend v. Hamill*, 34 Md. 293.)

II. MINISTERIAL OFFICERS.

(46 N. Y. 194.)

MCCARTHY et al. v. CITY OF SYRACUSE.

(*Court of Appeals of New York. Sept. 15, 1871.*)

1. MUNICIPAL CORPORATIONS—CONSTRUCTION AND REPAIR OF SEWERS.

When the duty is imposed by law on the mayor and common council of a city to make and repair sewers in the city, an entire omission to construct a sewer, or a failure to make it of sufficient size, creates no liability on the part of the city, as the duty of determining where sewers shall be located and their dimensions is, in its nature, judicial; but where a sewer has been determined upon, and is constructed, the duties of constructing it properly, and keeping it in good condition and repair, are ministerial, and negligence in the performance of these duties will render the city liable for damages resulting therefrom.

2. SAME—NOTICE OF DEFECT.

The duty of the city to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed; and omitting to make the examination necessary to guard against an obstruction or dilapidation of the

sewer, which is an ordinary result of its use and might have been discovered on inspection, is a neglect of duty which renders the city liable for damages thereby caused, although none of its officials had notice that the sewer was obstructed or out of repair.

Appeal from supreme court, general term, fifth judicial district.

Action by Dennis McCarthy and others against the city of Syracuse for damages to plaintiffs' goods in a basement room of their store in said city. The basement extended under the sidewalks of the streets on which the store was situated, and was flooded with water from a sewer in said streets, constructed by the city, and plaintiffs' goods were injured thereby. Upon trial before a referee, he found in favor of plaintiffs, and judgment was entered on his report, and affirmed by the general term on appeal. Defendant appealed from the judgment of the general term.

D. Pratt, for appellant. *George N. Kennedy*, for respondents.

RAPALLO, J. The principle appears to

be settled in this state that, where a duty of a ministerial character is imposed by law upon a public officer or corporation, a negligent omission to perform that duty creates a liability on the part of such officer or corporation for the damages which individuals may sustain by reason of such omission, and that such liability may be enforced in a civil action by the party injured. *Addit v. Brady*, 4 Hill, 630; *Robinson v. Chamuelrain*, 34 N. Y. 389; *Hutson v. Mayor, etc.*, 9 N. Y. 169; *Insurance Co. v. Baldwin*, 37 N. Y. 648; *Hover v. Barkhoof*, 44 N. Y. 113; *Barton v. City of Syracuse*, 36 N. Y. 54.

The charter of the city of Syracuse, which was in evidence on the trial of this action, contains provisions making it the duty of the mayor and common council to make, open, regulate, repair, and improve sewers in said city; and it is found by the referee that, at the time of the injury, they employed a superintendent and deputies to take care of the streets and sewers, and keep them in repair. It was decided in the case of *Barton v. The City of Syracuse*, 36 N. Y. 54, that, if the city entered upon the performance of this duty, negligence in its performance created a liability to the party injured, and the city was in that case held liable for damages sustained by a party whose property was injured by the overflow of a sewer, caused by an accumulation of mud and filth.

The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of the city, for the reason that the duty of determining where sewers shall be located, and their dimensions, is in its nature judicial. *Mills v. City of Brooklyn*, 32 N. Y. 489. But where a sewer has been determined upon, and is constructed, all the authorities agree that the duties of constructing it properly, and keeping it in good condition and repair, are ministerial; and that negligence in the performance of those duties will render the city liable for damages resulting therefrom. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Wilson v. Mayor, etc.*, 1 Denio, 595; *Barton v. City of Syracuse*, 36 N. Y. 54.

The referee has found as facts that the plaintiffs' premises were flooded, and their goods damaged, in consequence of the inability of the sewer in question to carry off the water which fell in the street during a heavy rain, and that this inability of the sewer resulted from its having become obstructed by the falling down of a portion of the bricks of which the inlet was constructed, and the accumulation upon such fallen bricks of mud and street filth, almost entirely closing the inlet; and that the defendant was guilty of a neglect of duty in permitting the sewer to become obstructed and out of repair; and that, by reason of such negligence, the plaintiffs sustained the damages for which the judgment was rendered. This finding of a neglect of duty on the part of the city officials is essential to the plaintiffs' case. Although the duty, under a city charter, of keeping sewers and other constructions in repair, may in one sense be regarded as founded upon a contract, implied from the acceptance of the benefits of the char-

ter, to perform the duties imposed by the same instrument, yet the obligation has not, in any of the cases, been extended beyond that of exercising due diligence. No case has gone so far as to hold that there is an absolute undertaking or guaranty, on the part of the corporation, that these constructions shall at all times, and under all circumstances, be in proper condition, or to hold the city responsible without some wrongful act or negligent omission on its part. The appellant contends that the uncontroverted facts establish that in this case there was no such negligence, and they rely mainly upon the fact found by the referee, that none of the officials of the city had notice that the sewer was obstructed or out of repair. The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. When the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated, and could be guarded against by occasional examination and cleansing, the omission to make such examinations, to keep the sewers clear, is a neglect of duty which renders the city liable. *Barton v. City of Syracuse*, 37 Barb. 292; affirmed, 36 N. Y. 54.

But it is further claimed in this case by the appellant that the obstruction was caused by the falling in of the bricks of which the inlet was built, and that these bricks must have fallen in during the extraordinarily heavy rain which resulted in the damage in question, or during a shower which occurred a few hours previously and on the same day. The referee has not found, nor does the evidence disclose with certainty, when this falling in occurred. It is argued, from the fact that during the first shower no water came into the plaintiffs' premises, that the sewer was then in good order. But that is not a necessary sequence. The sewer may have been then partially obstructed, but still have had sufficient capacity to carry off the water which fell at that time, or enough of it to protect the plaintiffs' premises. The street had been flooded in previous rains without injury to the plaintiffs. Neither was it shown that this falling in of the bricks was not caused by some negligence in the construction of the sewer. If the appellants had shown that the sewer was constructed in a workmanlike manner, and that care had been exercised to keep it in proper order, and that, notwithstanding this care, it had caved in, then their want of notice of the injury in season to repair it would have excused them, and this court would be justified in reversing the finding of negligence. But nothing was shown as to the mode of construction of the sewer, nor was it proved that any examination of it had ever been made since it was built.

How long it had been falling into the condition in which it was finally found, or from what cause it became so dilapidated, are left to conjecture. The referee has found that the obstruction might have been discovered on inspection, and that the city was negligent in permitting the sewer to become obstructed and out of repair; and, although it may be that the evidence would have justified a different conclusion, we do not think the case sufficiently clear to authorize us to reverse the finding of the referee, on the ground that there is no evidence to sustain it.

The excavation by the plaintiffs was not unlawful. They owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way the plain-

tiffs would have been responsible. But, so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property. They were not bound to leave the earth there, as a protection against a possible overflow of the sewer. The question whether the damage was caused by the stoppage of the sewer was one of fact. There was evidence from which that inference could be drawn, and we cannot review the conclusion of the referee in that respect. The judgment should be affirmed, with costs.

CHURCH, C. J., and ALLEN and PECKHAM, JJ., concurred. GROVER and FOLGER, JJ., dissented. ANDREWS, J., did not vote. Judgment affirmed.

(See, also, *Clark v. Miller*, 54 N. Y. 528; *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. Rep. 403; *Insurance Co. v. Leland*, 90 Mo. 177, 2 S. W. Rep. 431; *Amy v. Supervisors*, 11 Wall. 136; *Grider v. Tally*, 77 Ala. 422.)

(110 Mass. 474.)

KEENAN v. SOUTHWORTH.

(*Supreme Judicial Court of Massachusetts*.
Oct. Term, 1872.)

POSTMASTER—NEGLIGENCE OF CLERK.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, although selected by him and subject to his orders.

Case reserved from superior court.

Action of tort by James H. Keenan against John T. Southworth, postmaster of East Randolph, for damages for the loss of a letter addressed to plaintiff. At the trial evidence was given for plaintiff tending to show that the letter was received at the post-office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. Plaintiff disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant." The judge ruled that defendant was not liable for any careless, negligent, or wrongful acts of Bird; and, by consent of plaintiff, he directed a verdict for the defendant, and reported the case for the con-

sideration of the court; if the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for defendant on the verdict.

S. R. Townsend, for plaintiff. B. W. Harris and P. E. Tucker, for defendant.

GRAY, J. The law is well settled in England and America that the postmaster general, the deputy-postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders. *Lane v. Cotton*, 1 Ld. Raym. 646, 12 Mod. 472; *Whitfield v. Le De Spencer*, Cowp. 754; *Dunlop v. Munroe*, 7 Cranch, 242; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Willamson*, 11 Me. 495; *Hutchins v. Brackett*, 2 Fost. (N. H.) 252. The ruling at the trial was therefore right, and the plaintiff, having consented to a verdict for the defendant, reserving only the correctness of the ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

Judgment on the verdict.

(See, also, *Teall v. Felton*, 1 N. Y. 537; *Wiggins v. Hathaway*, 6 Barb. 632; *Tracy v. Cloyd*, 10 W. Va. 19.)

(30 Cal. 190.)

BOULWARE v. CRADDOCK, Constable, et al.
(*Supreme Court of California*. July Term, 1866.)

SHERIFFS AND CONSTABLES—WRONGFUL SEIZURE OF PROPERTY UNDER EXECUTION.

A sheriff or constable who, under an execution, seizes and sells property not belonging to the execution debtor, although in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.

Appeal from district court, tenth judicial district, Sutter county.

Action by W. Boulware against C. C. Craddock, a constable, and James O. Harris and Samuel H. Pippin, his bondsmen, to recover the value of two horses alleged

to have been wrongfully seized and sold by Craddock as such constable. At the trial it appeared that plaintiff was the owner of the horses, and that they had strayed away from his premises, and that afterwards one Eaton had taken them into his possession; that defendant Craddock, as constable, having received an execution against Eaton, finding the horses in Eaton's possession, and supposing they were his property, seized and sold them as Eaton's property; that plaintiff was not informed of the seizure and sale of his horses until 15 days after the sale, when he informed Craddock that he owned the horses, and asked him where they were, and Craddock told him who the purchaser was and where he lived. Plaintiff did not

make any demand on Craddock for the horses or their value before bringing suit. The court below held that a demand was necessary to entitle plaintiff to recover, and gave judgment for defendants. Plaintiff appealed.

L. J. Ashford, for appellant. *J. Hart*, for respondents.

SHAFTER, J. In an action against a sheriff for a seizure and conversion of the plaintiff's property, taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. The sheriff, having misapplied his process, (and whether by mistake or design will make no difference,) stands in the position of every other trespasser, and is liable to an action the instant the trespass is commit-

ted. The circumstance that the property was in the possession of the execution debtor at the date of the seizure amounts to nothing except upon proof of fraud or commixture. The rule of the common law is correctly stated in *Ledley v. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Daumiel v. Gorham*, 6 Cal. 44. The statement of facts in *Taylor v. Seymour*, 6 Cal. 512, is imperfect; but, if that case is to be understood as laying down a different rule, then we prefer to follow *Ledley v. Hays*. See, also, *Codman v. Freeman*, 3 Cush. 314, and *Acker v. Campbell*, 23 Wend. 372.

The judgment is reversed, and the court below is directed to render judgment upon the findings in favor of the plaintiff.

RHODES, J., expressed no opinion.

(See, also, *State v. Koontz*, 83 Mo. 323; *Buck v. Colbath*, 3 Wall. 334; *Rankin v. Ekel*, 64 Cal. 446, 1 Pac. Rep. 895; *Symonds v. Hall*, 37 Me. 354.)

(34 Minn. 92, 24 N. W. Rep. 327.)

WELSH v. WILSON.

(*Supreme Court of Minnesota*. July 24, 1885.)

1. SHERIFFS AND CONSTABLES — LEVY OF EXECUTION — BREAKING OUTER DOOR OF DWELLING.

Plaintiff occupied as her dwelling, a building containing only one room, and also carried on there her trade as a milliner, and kept and exposed for sale a stock of goods. *Held*, that the fact that she so used it to transact her business did not change its character as her dwelling, and that the sheriff, having an execution against her, was not authorized to break the outer door for the purpose of levying upon her goods, and such levy was invalid. **MITCHELL, J.**, dissenting.

2. SAME — MITIGATION OF DAMAGES.

In an action for such wrongful levy, it could not avail the sheriff, in mitigation of damages, that he sold the goods and paid the proceeds to the execution creditor; the levy itself being invalid, every subsequent act based on it was but a continuation and aggravation of the original trespass.

Appeal from district court, Waseca county.

Action by Kate G. Welsh against Hugh Wilson, sheriff of Waseca county, for an alleged wrongful levy of an execution on plaintiff's goods. From a judgment for plaintiff, rendered upon a trial by jury, defendant appealed.

Lewis & Leslie, for appellant. *Colleston Bros.*, for respondent.

GILFILLAN, C. J. Plaintiff occupied in Waseca a building one-story high, of only one room. In this she with her daughter slept, and did upon a kerosene stove what cooking she did, but usually got their meals at a restaurant. In it she also pursued her trade as a milliner, and kept in it for sale, and exposed for sale, a stock of millinery goods. It was fitted up like a store, with shelves, tables for counters, show-cases on the tables, and one in front, on and in which her goods were kept for sale. The defendant, sheriff of the county, having an execution against her property, went about 10 o'clock in

the morning to the building, the door of which was then locked, put his hand through the window, a pane of which was broken, took the lock off the door, entered, and levied on and removed her goods. The validity of the levy is only in question.

The room must be taken to have been the plaintiff's dwelling,—her abode,—not merely when closed to business, but at all times when she occupied it for her dwelling. The fact that she also used it to transact her business did not change its character in that respect. It being her dwelling, it was unlawful for the sheriff to break the outer door to effect an entrance for the purpose of serving civil process. This proposition has never been doubted, either in England or in this country. It is also well settled in this country—there being no authority to the contrary—that no valid levy can be made by means of such unlawful entry. We may perhaps regret that such is the rule,—may be able to see that unfortunate consequences will sometimes result from it,—but it is too firmly established to be disturbed, except by act of the legislature. The levy being invalid, nothing which the sheriff did pursuant to it was valid. Every subsequent act based on the levy, and depending on it for its lawfulness, was but a continuation and aggravation of the original trespass. It can therefore be of no avail to the sheriff that he sold the goods, and paid the proceeds to the execution creditor. In the cases where, as in *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. Rep. 946, such subsequent appropriation has been allowed to operate in mitigation of damages, there has been a subsequent valid levy, not connected with the trespass, which gave validity to the sale and appropriation of the proceeds.

Judgment affirmed.

MITCHELL, J., dissenting.

(See, also, *Semayne's Case*, 5 Coke, 91a; *Clark v. Wilson*, 14 R. I. 11; *Haggerty v. Wilber*, 16 Johns. 287; *Williams v. Spencer*, 5 Johns. 352; *Curtis v. Hubbard*, 4 Hill, 437; *Solinsky v. Bank*, 85 Tenn. 365, 4 S. W. Rep. 836.)

(5 Hill, 440.)

PEOPLE v. WARREN.

(Supreme Court of New York. July Term, 1843.)

SHERIFFS AND CONSTABLES—ARREST UNDER WARRANT REGULAR ON ITS FACE.

A warrant regular on its face is a sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.

Certiorari to court of general sessions, Oneida county.

Indictment against defendant for assault and battery upon one Johnson, a constable, in resisting arrest by Johnson on a warrant, issued by the inspectors of election of the city of Utica against defendant for interrupting the proceedings at an election by disorderly conduct in the presence of the inspectors. 1 Rev. St. N. Y. p. 137, § 37. The warrant was regular and sufficient upon its face. Defendant offered to prove that he had not been in the hearing or presence of the inspectors at any time during the election, and that Johnson knew it. The court excluded the evidence, and defendant was convicted,

(See, also, *Savacool v. Boughton*, 5 Wend. 170; *Woolsey v. Morris*, 96 N. Y. 311; *Barr v. Boyles*, 96 Pa. St. 31; *Fisher v. McGirr*, 1 Gray, 45; *Mangold v. Thorpe*, 33 N. J. Law, 134; *Underwood v. Robinson*, 106 Mass. 296; *Thurston v. Adams*, 41 Me. 419.)

and moved for a new trial on a bill of exceptions.

W. Hunt, for defendant.

The evidence should have been admitted. It would have shown that the inspectors had no jurisdiction of the subject-matter, and, if the officer knew it, his process was no justification of the arrest. *Parker v. Walrod*, 16 Wend. 514.

PER CURIAM. Although the inspectors had no jurisdiction of the subject-matter, yet, as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some *dicta* the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it. *Webber v. Gay*, 24 Wend. 485; *Watson v. Watson*, 9 Conn. 140.

New trial denied.

CRIMINAL CONVERSATION AND SEDUCTION.

(134 Mass. 123.)

BIGAQUETTE v. PAULET.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 3, 1883.)

CRIMINAL CONVERSATION — GROUNDS OF ACTION BY HUSBAND.

An action may be maintained by a husband for the loss of *consortium* with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.

Exceptions from superior court.

Action of tort by Noel Bigaquette against Henry Paulet in four counts. The first count was for seduction of plaintiff's wife; the second and fourth were for assaults upon her, and the third was for a rape; whereby plaintiff lost her comfort, assistance, society, and benefit. A bill of exceptions, allowed by the trial judge, was, in substance, as follows: The only witnesses were plaintiff and his wife. The wife testified that plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under defendant, and that they were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, defendant told plaintiff's wife that he would turn her husband away from the factory, if she refused to receive defend-

ant's visits; that on July 5, 1876, defendant violently and forcibly ravished her, and that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and defendant, and three days afterwards plaintiff was discharged from the factory by defendant; that shortly after July 5, 1876, plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her, and that she attended to and performed her ordinary domestic duties in her husband's family up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case. The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of loss of the wife's services to enable the plaintiff to maintain this action. The judge ruled that as there was no evidence to support the count charging defendant with seducing plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused

to plaintiff, the action could not be maintained, and directed a verdict for defendant. Plaintiff alleged exceptions.

A. Russ and H. B. Sargent, Jr., for plaintiff. W. P. Harding, for defendant.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only. He must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word "*consortium*,"—the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of a husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of his wife. This is illustrated in the statements of injuries to a husband in 3 Bl. Comm. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the other, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium auisit*, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the *consortium* is presumed,

although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action; and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 Car. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice HOLT, "that the law indulges the husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, Bac. Abr. "Trespass," C 1; and Id. "Marriage," F 2; 2 Chit. Pl. (13th Amer. Ed.) 855; Reeve, Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind; that the corrupting of the body, rather than the mind, of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the *consortium* with the wife which is implied from criminal conversation with her, whether with or against her will. Exceptions sustained.

(See, also, *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. Rep. 108; *Wales v. Miner*, 89 Ind. 118; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. Rep. 79; *Heermance v. James*, 47 Barb. 120.)

(11 N. Y. 343.)

MULVEHALL v. MILLWARD.

(Court of Appeals of New York. Sept. Term, 1854.)

SEDUCTION—GROUNDS OF ACTION BY PARENT.

Plaintiff's minor daughter, who had left his house to work for defendant, was seduced by the latter while in his employ, and became pregnant. She thereafter worked at other places, but did not return to her father's house, nor did it appear that she had any intention to return there, until after her confinement and the birth of her child; and it was not shown that her father took any care of her or expended any money on her account during her pregnancy or sickness. Held that, as he had not surrendered his legal right to her services, he could maintain an action for her seduction.

Appeal from superior court of New York city, general term.

Action for the seduction of plaintiff's daughter by defendant. At the trial, in March, 1852, the daughter testified that she was then residing with her father, the plaintiff, and that she had attained the age of 21 years in January, 1852; that in November, 1850, she had left her father, and had gone to work for defendant; that a few weeks afterwards, while in the employ of defendant, she was seduced by him, and became pregnant; that subsequently, and before the birth of her child, she worked for others; and that she was delivered of the child at another place. There was no evidence that she returned to her father's from the time she went to work for the defendant until after her recovery from her sickness at her confinement, or that her father took any care of her, or expended any money on her account, during her pregnancy or sickness. When plaintiff rested, defendant moved for a nonsuit, on the ground "that no expense or actual loss of service to the plaintiff had been proved." The motion was denied, and defendant excepted. Evidence was then given for defendant, and the cause submitted to the jury, which found a verdict for plaintiff for \$3,000. Judgment for plaintiff was entered on the verdict, and was affirmed on appeal to the general term of the superior court. From the judgment of the general term defendant again appealed.

J. Van Buren, for appellant. A. L. Pinney, for respondent.

EDWARDS, J. It was proved upon the trial that the plaintiff's daughter, at the time of her seduction, was in the defendant's service, and it did not appear that there was *animus revertendi*, or that she, in fact, returned to her father's house until after her confinement. Upon this state of facts it was contended upon the part of the defendant that, as no expense or actual loss of service on the part of the plaintiff was proved, he should be nonsuited, and a motion was made to that effect, which was overruled. In the case of *Dean v. Peel*, 5 East, 45, the plaintiff's daughter at the time of her seduction was under age, but was living in the family of another person, in the capacity of a housekeeper, with no intention at the time of her seduction of returning to her father's house,

although she did return there while she was under age, in consequence of her seduction, and was maintained by her father. Upon this state of facts it was held that, as the daughter was actually in the service of another person than her father, and as there was no *animus revertendi*, the action could not be maintained. The rule thus laid down has been since followed in the English courts. *Blaymire v. Haley*, 6 Mees. & W. 55; *Harris v. Butler*, 2 Mees. & W. 539; *Grinnell v. Wells*, 7 Man. & G. 1033. In a few years after the decision in *Dean v. Peel*, a somewhat similar case arose in this state, in which it appeared that the plaintiff's daughter, who was under age, went, with the consent of her father, to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement that she should continue to live in his house for any fixed time. While in her uncle's house she was seduced, and got with child. Immediately afterwards she returned to her father's house, where she was maintained, and the expense of her lying-in was paid by him. Upon this state of facts it was held, contrary to the case above cited, that the action could be maintained. In delivering the opinion of the court, SPENCER, C. J., said: "The case of *Dean v. Peel* is against the action. In the present case the father had made no contract binding out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and, although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. She was his servant *de jure*, though not *de facto*, at the time of the injury; and, being his servant *de jure*, the defendant has done an act which has deprived the father of the daughter's services, and which he might have exacted but for that injury." *Martin v. Payne*, 9 Johns. 387. This decision was afterwards approved of in *Nickleson v. Stryker*, 10 Johns. 115. In the case of *Clark v. Fitch*, 2 Wend. 459, it was proved upon the trial that the plaintiff told his daughter that she might remain at home or go out to service as she pleased, but, if she left his house, she must take care of herself, and he relinquished all claim to her wages and services. It was contended that there was a distinction between this case and that of *Martin v. Payne*, on the ground, (1) that the father had given his daughter her time absolutely; (2) that he had in fact incurred no expense; but it was held that this made no difference, and that the personal rights of the father over the child were not relinquished. In the recent case of *Bartley v. Richtmyer*, 4 N. Y. 38, BRONSON, C. J., in giving the opinion of the court, says that "our cases hold that the relation of master and servant may exist for the purposes of this action, although the daughter was in the service of a third person at the time of her seduction, provided the case be such that the father had then a legal right to her services, and might have commanded them at pleasure." But it was there held that the step-father had no such right, and consequently could not maintain the

action. In Pennsylvania a similar rule has been adopted. *Hornketh v. Barr*, 8 Serg. & R. 36; *Plumer v. Robertson*, 6 Serg. & R. 177. See, also, *Mercer v. Walmsley*, 5 Har. & J. 27. And Greenleaf, in his treatise on Evidence, lays it down as the established American rule. 2 Greenl. Ev. § 576. Whether it be more or less consistent with principle and policy than the English rule it is now too late to inquire. It is too well established by authority. The case of *Dain v. Wycoff*, 7 N. Y. 191, was cited on the part of the defendant;

but it will be seen, by reference to the opinion delivered in that case, that it was decided upon the very distinction which has been laid down in the adjudications referred to. In that case the plaintiff's daughter was bound out to service to another, and the plaintiff had no right to her services. The judgment should be affirmed.

All the judges, except RUGGLES, who did not hear the argument and took no part in the decision, concurred.

Judgment affirmed.

(See, also, *Lawrence v. Spence*, 99 N. Y. 669, 2 N. E. Rep. 145; *White v. Nellis*, 31 N. Y. 405; *Riddle v. McGinnis*, 22 W. Va. 253; *Blagge v. Ilisley*, 127 Mass. 191; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. Rep. 599; *Ogborn v. Francis*, 44 N. J. Law, 441.)

NEGLIGENCE.

I. NEGLIGENCE GIVES A CAUSE OF ACTION WHEN IT VIOLATES A LEGAL DUTY.

(101 N. Y. 391, 4 N. E. Rep. 752.)

LARMORE V. CROWN POINT IRON CO.

(*Court of Appeals of New York*. Feb. 9, 1886.)

NEGLIGENCE — DANGEROUS PREMISES — DEFECTIVE MACHINE.

A person who goes upon the land of another without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, though he can show that the owner might have ascertained the defect by the exercise of reasonable care, for as to such person there is no violation of a legal duty. 31 Hun, 87, *mem.*, reversed. RUGER, C. J., dissenting.

Appeal from supreme court, general term, third department.

Action by Dennis Larmore against the Crown Point Iron Company for personal injuries caused by the alleged negligence of defendant. Verdict and judgment for plaintiff. A motion for a new trial was denied, and defendant appealed to the general term, which affirmed the judgment, and defendant again appealed.

M. D. Grover, for appellant. *Matthew Hale*, for respondent.

ANDREWS, J. We are unable to perceive, upon the evidence in this case, that any duty rested on the defendant to keep the whimsey in repair for the protection of the plaintiff. The defendant, for its own purposes, and in the prosecution of its business, had constructed a machine for raising ore from its mines. It consisted of an upright, or mast, in which a lever was inserted by the device of a mortise and tenon, and, as an additional precaution for keeping the lever in place, an iron pin was driven through the mast and tenon. The machine was worked by attaching horses to the end of the lever, by means whereof a bucket filled with ore

was raised from the mine to the surface of the ground, and, when discharged, the bucket, by its own weight, descended, turning the lever with some rapidity in its descent. The lever, on the occasion in question, while the bucket was descending, was thrown out of the socket at the mast, and, flying around, hit and broke the legs of the plaintiff, who was in a path leading to one of the pits worked by the defendant. The machine had been in use several years without accident. It appeared, on examination of the lever, after the occurrence in question, that the pin which held it to the mast had broken through the wood of the tenon, back of the point where the pin passed through it, and the lever, not being firmly held to its place by the other arrangements, came out, and caused the injury. There was evidence that other and surer precautions might have been, and in other mines had sometimes been, taken, to secure the lever to the mast, than those adopted by the defendant. But the judge excluded the question of faulty construction from the jury, and submitted to them, as the sole ground of negligence to be considered, whether the defendant had omitted to make proper inspection of the machine, to discover defects arising after its original construction, or to make proper repairs to render it safe.

The negligence of the defendant, if any, upon the case as presented, consisted in an omission to take affirmative measures to ascertain and remedy defects in a machine originally suitable, developed by use, and which might have been discovered by proper inspection. It may be assumed, and the assumption is justified by decided cases, that, as to persons standing in certain relations to the defendant, a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a fail-

ure to perform it would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant as imposed upon it the duty to keep the machine in repair. He was, at the time of the accident, in every legal sense a stranger to the defendant. He had before that been employed by the superintendent of the company to work by the day, and had been assigned to a particular service, which, however, he had abandoned two days before the accident, and on the day of the accident he went upon the defendant's land to seek further employment at a pit, to which the path, used by the workmen, led, on which he was standing when the accident happened. He was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied; nor was he there, in any proper sense, on the business of the company. The suggestion made to him by the foreman at pit No. 5, two days before the accident, on the occasion of his refusing to work at that pit any longer, on account of the supposed danger, that he could probably "get a chance" at some other pit, was not an authority or invitation by the company to him to visit the other pits on the premises. The foreman had no authority to give the plaintiff permission to go elsewhere upon the defendant's lands, and the suggestion was obviously a mere friendly one, made by the foreman in the interest of the plaintiff. The fact that the plaintiff had, on going to pit No. 10, engaged to commence work there on the following Monday, did not change his relation to the defendant, or make him other than a mere licensee on the premises. He went there on his own business, and in returning he was subserving his own purposes only.

The precise question is whether a person who goes upon the land of another without invitation, to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances. An employer is required to take reasonable precautions and to exercise reasonable care in providing safe machinery and appliances for the use of his servant. The duty arises out of

the relation. *Fuller v. Jewett*, 80 N. Y. 46. The owner of land, in general, may use it as he pleases, and leave it in such condition as he pleases; but he cannot, without giving any warning, place thereon spring-guns or dangerous traps which may subject a person innocently going on the premises, though without actual permission or license, to injury, without liability. The value of human life forbids measures for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in this case grows out of the circumstances, independently of any question of license to enter the premises. *Bird v. Holbrook*, 4 Bing. 628. So, also, where the owner of land, in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers; as, for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. *Corby v. Hill*, 4 C. B. (N. S.) 556; *Smith v. London, etc., Docks Co.*, L. R. 3 C. P. 326; *Holmes v. Railway Co.*, L. R. 6 Exch. 123. The duty of keeping premises in a safe condition, even as against a mere licensee, may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed, to great danger. The case of running a locomotive, without warning, over a path across the railroad, which had been generally used by the public without objection, furnishes an example. *Barry v. Railway Co.*, 92 N. Y. 289. See, also, *Beck v. Carter*, 68 N. Y. 283.

The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us there were no circumstances creating a duty on the part of the defendant, to the plaintiff, to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous. The plaintiff was a mere licensee. The negligence, if any, was passive, and not active,—of omission, and not of commission. Under the circumstances, we think the motion for nonsuit should have been granted. See *Severy v. Nickerson*, 120 Mass. 306; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

The judgment should therefore be reversed, and a new trial ordered.

RAPALLO, EARL, and FINCH, JJ., concur. DANFORTH, J., concurs in result. RUGER, C. J., dissenting. MILLER, J., not voting.

(See, also, *Sweeney v. Railroad Co.*, 10 Allen, 368; *Railroad Co. v. Munger*, 5 Denio, 255, 266; *Nicholson v. Railroad Co.*, 41 N. Y. 525; *Railroad Co. v. Coon*, 111 Pa. St. 430, 3 Atl. Rep. 234; *Heaven v. Pender*, 11 Q. B. Div. 503; *Batchelor v. Fortescue*, Id. 474; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311.)

II. LIABILITY FOR NEGLIGENCE CONTRASTED WITH ABSOLUTE LIABILITY.

(38 N. J. Law, 339.)

MARSHALL v. WELWOOD *et al.*

(Supreme Court of New Jersey. June Term, 1876.)

NEGLIGENCE—EXPLOSION OF STEAM-BOILER.

An owner is not liable for injuries caused by the explosion of a steam-boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.

Motion for new trial.

Action by Maurice F. Marshall against Joseph Welwood and Melville Garside for damages to plaintiff's property caused by the explosion of a steam-boiler on defendant Welwood's adjoining premises, which boiler Welwood had bought from defendant Garside, who was experimenting with it at the time of the explosion. The verdict was for plaintiff against both defendants. Defendants moved for a new trial.

Argued before BEASLEY, C. J., and WOODHULL, VAN SYCKEL, and SCUDDER, JJ.
J. B. Vredenburg, for the motion.

BEASLEY, C. J. The judge at the trial of this cause charged, among other matters, that as the evidence incontestably showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was that a person is responsible for the immediate consequences of the bursting of a steam-boiler, in use by him, irrespective of any question as to negligence or want of skill on his part. This view of the law is in accordance with the principles maintained, with great learning and force of reasoning, in some of the late English decisions. In this class the leading case is that of *Fletcher v. Rylands*, L. R. 1 Exch. 265, which was a suit on account of damage done by water escaping onto the premises of the plaintiff from a reservoir which the defendant had constructed, with due care and skill, on his own land. The judgment was put on a general ground, for the court said: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to and rule the pres-

ent case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and therefore if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor in raising steam in a boiler of proper quality. Neither act, when performed, is a nuisance *per se*; and the inquiry consequently is whether, in the doing of such lawful act, the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret or unascertainable, by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence.

I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands* appears to me to consist in this: that the rule mainly applicable to a class of cases which I think should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect that the owner must take charge of his cattle at his peril, and, if they evade his custody, he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the land-owner should be successfully restrained was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage-feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a

vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the negligent owner rests in *dicta*, and not in express decision. But, waiving this, there is a consideration which seems to me to show that this obligation, which is put upon the owner of errant cattle, should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: that the owner of such cattle is, after all, liable only *sub modo* for the injury done by them; that is, he is responsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict on the person of others,—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person, being the cause of the mischief, should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule, which applies to damage done by straying cattle, was carried beyond its true bounds, when it was appealed to as proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of a man who was sued for not keeping the wall of his privy repaired, to the detriment of his neighbor, being the case of *Tenant v. Golding*, 1 *Salk.* 21; and several actions which it is said had been brought against the owners of some alkali works for damages alleged to have been caused by the chlorine fumes escaping from their works, which works the case showed had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Golding* presented merely the question whether a land-owner is bound in favor of his neighbor to keep the wall of his privy in repair, and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill, with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind was, in itself, a *prima facie* case of negligence, and it seems to me that all the court decided was to hold so. But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: that

the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held that, failing in the attempt, the nuisance remains. I cannot agree that from these indications the broad doctrine is to be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed and in contrast to principles which it seems to me must be considered much more general in their operation and elementary in their nature. The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must come from a wrongful act. Mr. Addison, in his work on Torts, (volume 1, p. 3,) very correctly states this rule. He says: "A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages." Among other examples, he refers to an act of force, done in necessary self-defense, causing injury to an innocent by-stander, which he characterizes as *damnum sine injuria*, "for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted, such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dykes. Many illustrations of the same bearing are to be found scattered through the books of reports. Thus *Dyer*, 25*b*, says "that, if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class, where animals which are usually harmless do damage; the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these in principle are cases of injury done to innocent persons by horses, in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendant's servants were lowering, (*Scott v. Dock Co.*, 3 *Hurl. & C.* 596;) or in cases of collision, either on land or sea, (*Hammeck v. White*, 11 *C. B.*, *N. S.*, 588.)

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conduct-

ed without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive; for if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done. Nor is the reason upon which it rests satisfactory; for, if traffic cannot be carried on without some risk, why can it not be said, with the same truth, that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; the ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all branches of the law, the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence

can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger. If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or by-standers, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents. This view of the subject is taken in the American decisions. A case in all respects in point is that of *Losee v. Buchanan*, 51 N. Y. 476. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam-boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

The rule should be made absolute.

(See, also, *Losee v. Buchanan*, 51 N. Y. 476; *Brown v. Collins*, 53 N. H. 442; *Fletcher v. Rylands*, L. R. 1 Exch. 265; L. R. 3 H. L. 330. In Massachusetts the English doctrine is followed; *Gorham v. Gross*, 125 Mass. 238.)

III. CONTRIBUTORY NEGLIGENCE.

1. General principle.

(95 U. S. 439.)

BALTIMORE & P. R. CO. v. JONES.

(*Supreme Court of United States*. Oct. Term, 1877.)

1. CONTRIBUTORY NEGLIGENCE—DEFEATING A RECOVERY.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.

2. SAME—MASTER AND SERVANT.

Railroad workmen were accustomed to ride to and from their work on the pilot and tender of the engine of the work-train, though they had been informed that it was dangerous, and a box-car had been provided for them. In a collision between such work-train and cars standing on the track, plaintiff, riding on the pilot, was injured, while the workmen in the box-car were not injured. *Held*, that plaintiff was guilty of contributory negligence, which would defeat a recovery for his injuries in an action against the railroad company, and that it was no excuse that he was told by the engineer, when the train was starting, to "hurry up."

Baltimore & Potomac Railroad Company to recover for personal injuries caused by the alleged negligence of defendant. Verdict and judgment were for plaintiff. Defendant sued out a writ of error.

Enoch Totten, for plaintiff in error.
Edward C. Carrington and *Campbell Carrington*, *contra*.

SWAYNE, J. The defendant in error was the plaintiff in the court below. Upon the trial there he gave evidence to the following effect: For several months prior to the 12th of November, 1872, he was in the service of the company as a day laborer. He was one of a party of men employed in constructing and keeping in repair the road-way of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connec-

Error to the supreme court of the District of Columbia.

Action by William H. Jones against the

tion with the train. On the 12th of November, before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat-cars with dirt, and unloading them at an adjacent point. The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time, and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant, and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia-Avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car, and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel, were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows. "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not." This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: (1) The exception touching the admission of evidence. (2) As to the application of the rule relative to injuries received by one servant by reason of the negligence of another servant, both being at the time engaged in the same service of a common superior. (3) As to contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Whart. Neg. § 1, and notes. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not. *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Railroad Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Clayards v. Dethick*, 12 Q. B. 439; *Van Lien v. Manufacturing Co.*, 14 Abb. Pr. (N. S.) 74; *Ince v. Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence. The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and

that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is

thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey v. Railroad Co.*, 14 Allen, 429; *Todd v. Railroad Co.*, 3 Allen, 18, 7 Allen, 207; *Gavett v. Railroad Co.*, 16 Gray, 501; *Lucas v. Railroad Co.*, 6 Gray, 64; *Ward v. Railroad Co.*, 11 Abb. Pr. (N. S.) 411; *Railroad Co. v. Yarwood*, 15 Ill. 468; *Doggett v. Railroad Co.*, 34 Iowa, 284. The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. *Gavett v. Railroad Co.*, supra; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Pleasants v. Fant*, 22 Wall. 121.

Judgment reversed, and the cause remanded, with directions to issue a *venire de novo*, and to proceed in conformity with this opinion.

(See, also, *Wilds v. Railroad Co.*, 24 N. Y. 430; *Bowen v. Railroad Co.*, 59 Conn. 364, 21 Atl. Rep. 1073; *Railroad Co. v. Greiner*, 113 Pa. St. 600, 6 Atl. Rep. 246; *Murphy v. Deane*, 101 Mass. 455; *Railroad Co. v. Moore*, 24 N. J. Law, 824; *Monongahela City v. Fischer*, 111 Pa. St. 9, 2 Atl. Rep. 87; *Lent v. Railroad Co.*, 120 N. Y. 467, 24 N. E. Rep. 653.)

2. Negligence of plaintiff remote.

(10 Mees. & W. 545.)

DAVIES v. MANN.

(Court of Exchequer. Nov. 4, 1842.)

1. NEGLIGENCE.—REMOTE AND PROXIMATE CAUSE OF INJURY.

In an action for injuries alleged to have been caused by defendant's negligence, the negligence of plaintiff which will preclude his recovery must be such as that he could, by ordinary care, have avoided the consequence of defendant's negligence.

2. SAME.

Plaintiff fettered the forefeet of his ass, and turned it into the highway to graze, and defendant's servant, negligently driving along the highway, ran over it. *Held*, that the court properly charged that, if the proximate cause of the injury was attributable to the want of proper care on the part of defendant's servant, the plaintiff could recover, though plaintiff's act in fettering the ass so that he could not get out of the way of carriages, and turning him in the highway, was illegal.

Motion for new trial

Action by Davies against Mann to recover damages for the negligent killing of plaintiff's ass. On the trial there was evidence to show that plaintiff fettered the forefeet of the ass, and turned him into the highway to graze, and that defendant's wagon, with a team of three horses in charge of his servant, came down a slight descent at a rapid pace, and ran over the ass; that the road was eight yards wide; and that the driver was some little distance behind the horses. The court, *ERSKINE, J.*, charged the jury that, though the act of the plaintiff, in having the ass on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable

against the defendant, and, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for plaintiff. The jury found for plaintiff, damages 40 s. Defendant moved for a new trial.

Mr. Godson, for the motion.

ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but, even were it otherwise, it would have made no difference; for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This case was fully considered by this court in the case of *Bridge v. Railway Co.*, 3 Mees. & W. 246, where, it appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequence of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, 11 East, 60, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge v. Railway Co.* there was a plea

imputing negligence on both sides; here it is otherwise, and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his

action. All that is perfectly correct; for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

GURNEY and ROLFE, BB., concurred.
Rule refused.

(See, also, *Radley v. Railroad Co.*, L. R. 1 App. Cas. 754; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653; *Dun v. Railroad Co.*, 78 Va. 645; *Isbell v. Railroad Co.*, 27 Conn. 393; *Railroad Co. v. Mulligan*, 45 Md. 486; *State v. Railroad*, 52 N. H. 528; *Harlan v. Railroad Co.*, 65 Mo. 22; *Austin v. Steam-Boat Co.*, 48 N. Y. 75.)

3. Contributory negligence of children sui juris.

(39 Minn. 164, 39 N. W. Rep. 402.)

TWIST v. WINONA & ST. P. R. CO.

(*Supreme Court of Minnesota*. Aug. 30, 1888.)

1. NEGLIGENCE—CONTRIBUTORY—CHILDREN.

A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is responsible for the exercise of such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity.

2. SAME—PLAYING ABOUT RAILROAD TURN-TABLE.

A boy of the age of nearly 10½ years, and of average intelligence, who had been frequently in the vicinity of a railway turn-table, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play upon it, and told not to do so, and knew that the railway company prohibited children from playing on the table, and also knew that he had no right to play upon it, and that it was dangerous to do so, engaged with other boys in swinging upon it while in motion, and was injured by his foot being caught between the arm of the table and the stationary abutments. *Held*, that the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to understand and comprehend the full extent of the danger to which his conduct exposed him.

Appeal from district court, Nicollet county; WEBBER, Judge.

Action by Frank Twist against the Winona & St. Peter Railroad Company to recover damages for injuries sustained by plaintiff's minor child, Verne Twist, while upon defendant's turn-table. Verdict for plaintiff for \$5,000. A motion by defendant for judgment on the special findings or for a new trial was overruled, and it appealed.

Wilson & Bowers, for Winona & St. Peter Railroad Company, appellant. *Lusk & Bunn*, for Frank Twist, respondent.

MITCHELL, J. This action was brought to recover damages for personal injuries sustained by plaintiff's son while playing on one of defendant's turn-tables. The table was situated upon defendant's own premises, in the suburbs of St. Peter, some five or six hundred feet from the depot. The premises were uninclosed, but the table was not so near any highway or street as to interfere with the safety or conven-

ience of public travel. It was what is called a "skeleton" turn-table, of the kind in general use by railways except in round-houses. In accordance with the general usage, it was not locked, but was supplied with latches of the usual kind to keep it in place when in use. These latches weighed four or five pounds each, but could be lifted out of their sockets, and the table set in motion, by comparatively small children. Boys had been frequently in the habit of setting the table in motion, and playing on it, and during the 15 or 20 years it had been there three boys had been injured by it, all of which facts were known to the defendant. The agents of the railway company had frequently forbidden children from playing on the table, and were in the habit of driving them away when they saw them doing so. It does not appear but that some way might be devised of keeping such turn-tables locked when not in use, but the evidence does show that no such contrivance has yet been devised, and that the general custom is to leave them unlocked and merely held in place by latches, as this one was. Plaintiff's son, a boy of the age of 10 years and 4 months, went, in company with several other boys, into the vicinity of the table, and, after the others had set the table in motion, he also joined in swinging on it, and sustained the injuries complained of, in the usual way, by his foot being caught between the arms of the table and the stationary abutments. The negligence charged against the defendant is in not locking the table, so that it could not be set in motion by children.

The rule invoked by plaintiff is that laid down by this court in *Keffe v. Railroad Co.*, 21 Minn. 207, and by the supreme court of the United States in what may be termed the pioneer "turn-table case," (*Railroad Co. v. Stout*, 17 Wall. 657,) in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. The line of argument adopted in the *Keffe* case, in support of this rule, is that such machinery,

being attractive to young children, presents to them a strong temptation to play with it, and thus allures them into a danger whose nature and extent they, being without judgment and discretion, can neither apprehend nor appreciate, and against which they cannot protect themselves; that such children may be said to be induced by the owner's own conduct to come upon the premises; that what an express invitation is to an adult, an attractive plaything is to a child of tender years; that as to them such machinery is a hidden danger,—a trap. Much of the briefs of counsel, especially of that of defendant, is devoted to the consideration of the doctrine of these so-called "turn-table cases," and of the question of the duty, if any, which the owner of dangerous machinery or other articles situate on his own premises owes to intermeddling or trespassing children. The doctrine of these cases has been questioned by some courts, and repudiated by others, who hold that a land-owner is not bound to take active measures to insure the safety of intruders, even children, nor is he liable for any injury resulting from the lawful use of his premises to one entering without right; that to intruders or trespassers the land-owner owes no duty; and where there is no duty to perform there can be no negligence. *Frost v. Railroad Co.*, (N. H.) 9 Atl. Rep. 790. Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule; but if applied to children of tender years, strictly *non sui juris*, it would seem harsh and inhuman. Properly qualified and limited in its application, the doctrine of the *Keffe* Case is, in our judgment, in accordance with both reason and the dictates of humanity. But some of the cases have undoubtedly gone too far. By adopting an extreme or extraordinary standard of duty on the part of the land-owner on the one side, and on the other side by attributing the conduct of all children to their childish instincts so as to exempt them from the charge of contributory negligence, regardless of age or mental capacity, it is obvious that the rule of the *Keffe* and similar cases is capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves. This court itself, if it has not modified the *Keffe* Case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application. *Kolsti v. Railroad Co.*, 32 Minn. 133, 19 N. W. Rep. 655; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W.

Rep. 311. It is unnecessary, however, to determine whether, upon the facts in the present case, the finding of negligence on part of the defendant can be sustained, inasmuch as it is clearly established by both the evidence and the special findings of fact that the boy himself was guilty of contributory negligence. The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied as a rule of law to all children, without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger. In the *Stout* Case, the defendant made an express disclaimer of any contributory negligence on the part of the plaintiff. In the *Keffe* Case, which was disposed of on the pleadings, this court said: "It was not urged upon the argument that plaintiff was guilty of contributory negligence, and we have assumed that he exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using." And as was remarked in the *Keffe* Case, in the cases cited in support of these "turn-table cases," the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who by his own act contributed to the injury; and the distinction is not sharply drawn between the effect of plaintiff's trespass as a bar to his right to require care, and the plaintiff's contributory negligence as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But the authorities are all one way, and to the effect that even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence. *Wendell v. Railroad Co.*, 91 N. Y. 420; *Messenger v. Dennie*, 141 Mass. 335, 5 N. E. Rep. 283; *Railway Co. v. Eininger*, 114 Ill. 79; *Brown v. Railroad Co.*, 58 Me. 384; *Achtenhagen v. City of Watertown*, 18 Wis. 331; *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. Rep. 776; *Murray v. Railroad Co.*, 93 N. C. 92; *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. Rep. 505; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Gillespie v. McGowan*, 100 Pa. St. 144.

The evidence in the present case shows without conflict substantially the following facts: The boy was nearly 10½ years

old, and of at least average intelligence. He had been at school since he was 6 or 7 years old. His father was a railroad man, in the employment of the defendant around the yard and depot, and the boy had been frequently around the railroad grounds and the turn-table with his father. He was evidently familiar, at least in a general way, with the working of the turn-table, and the use of the latches. His father had repeatedly warned him against going on the turn-table, and told him of the danger, and that he must not go on it. He evidently had quite a lively sense of the danger of playing on the table, and of the manner in which accidents were liable to occur to those swinging on it. The boy himself admits that he knew there was great danger of getting hurt on it. He knew that playing on it was forbidden by the railroad company, and that if its agents saw children doing so they would drive them off. It is suggested that his motive in going to the table was to try to induce the other boys to get off lest they might get hurt. But if he had such a realizing sense of their danger, so much the more inexcusable was it for him to go and do precisely what he knew was exposing them to danger. Upon this state of the evidence the jury, in addition to their general verdict, found the following facts in answer to the following questions submitted to them: "*First*. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that it was dangerous? Answer. Yes. *Second*. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that he had no right to go there, and that it was dangerous to play on the turn table? A. Yes. *Third*. Was Verne Twist, when he went to play on this turn-table, on the day when he was hurt, of sufficient age and discretion to understand and comprehend the danger he subjected himself to? A.

No." These special findings must, if possible, be so construed as to be consistent with each other, and also supportable by the evidence. If the third finding means that the boy was of such tender years as to be incapable of exercising any judgment and discretion, or of understanding that his acts exposed him to danger, it would be inconsistent with the other findings, and wholly unsupported by the evidence. In the light of the testimony, and taken in connection with the previous findings, all that it can mean is that while the boy knew that he had no right to play on the turn-table, and that it was dangerous to do so, yet he did not fully understand or appreciate the extent of the danger in all its possibilities. But this may be said of almost every case of contributory negligence, even on the part of adults. No one voluntarily and unnecessarily enters a danger which he knows to exist without expecting to escape it. In all cases of conscious self-exposure there is a failure to realize the extent or degree of the risk, but the act is none the less contributory negligence, if the party fails to exercise ordinary care. In the present case, while the boy did not realize the extent of the danger as fully as would an adult, yet he knew that he had no right to go upon the turn-table; that his father had warned him that it was dangerous, and he himself knew that it was dangerous. Yet he goes, a conscious trespasser, and does the forbidden and dangerous act. While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on the part of an intelligent boy of nearly 10½ years amounts to contributory negligence, and cannot be excused on the plea of childish instincts. We are of opinion that upon the special findings the defendant was entitled to judgment. The cause is remanded, with directions to the district court to enter judgment for defendant.

(See, also, *Thurber v. Railroad Co.*, 60 N. Y. 326; *Stone v. Railroad Co.*, 115 N. Y. 104, 21 N. E. Rep. 712; *Rolling-Mill Co. v. Corrigan*, Ohio Sup., 20 N. E. Rep. 466; *Beckham v. Hillier*, 47 N. J. Law, 12; *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. Rep. 856; *Railroad Co. v. Hassard*, 75 Pa. St. 367; *Railroad Co. v. McDonnell*, 43 Md. 534; *Railroad Co. v. Delaney*, 82 Ill. 193.)

4. Imputation of negligence to children non sui juris.

—Different theories.

(21 Wend. 615.)

HARTFIELD v. ROPER *et al.*

(*Supreme Court of New York*. Oct. Term, 1839.)

1. NEGLIGENCE — INJURIES TO CHILD — IMPUTED NEGLIGENCE.

An infant of tender years is chargeable with the negligence of the person having him in charge.

2. SAME—STRAYING UPON HIGHWAY.

An infant permitted by his parents having him in charge to wander on the highway cannot recover for injuries caused by being run over by a traveler thereon, unless the injuries were voluntarily inflicted by, or were the result of gross carelessness of, the traveler.

Motion for new trial.

Action by William Hartfield, by his next friend, Gabriel Hartfield, against Roper and Newell to recover for personal

injuries. It appeared at the trial that the plaintiff, a child about two years old, was standing or sitting in the beaten track of a highway with no one near him, along which highway defendants were driving with a sleigh and horses, and that plaintiff was not seen by any persons in the sleigh until the horses were right on him, when they were checked and backed, before the sleigh ran over him, and that he received severe injuries to his arm. At the time of the accident the horses were trotting slowly, and had crossed a bridge just beyond which was the child. Defendants moved for a nonsuit, which was refused. Verdict for plaintiff. Defendants moved for a new trial.

J. A. Spencer, for defendants. *W. Tracy* and *W. C. Noyes*, for plaintiff.

COWEN, J. The injury to this child was doubtless a very serious misfortune to him. But I have been utterly unable to collect, from the evidence, anything by which the jury were authorized to impute such carelessness as rendered these defendants responsible. It is true, they might have seen the child from the turn of the road in descending, had they looked so far ahead; but something must be allowed for their attention to the management of the horses and their own safety in descending the hill to a bridge. So unobserving were they in fact that Mrs. Lewis, who sat in the rear of the sleigh, on the left side, and therefore in the best position of the three to overlook the road in its full extent as far as the place where the child was, did not discern him. It was somewhat severe, in a case like this, to allow testimony of Newell's ability to pay, though it was not objected to. It seems to imply that he had been so brutal as silently to allow Roper's going on, and endangering the child's life, after he [Newell] had discovered it to be in the road. But perhaps no objection can now be heard to that evidence having been received, because it was not made at the trial.

No doubt the action was properly brought in the name of the child, nor is there any objection to its form since the statute. 2 Rev. St. (2d Ed.) p. 456, § 16. Nor could the father have brought an action for loss of service, in respect to so small a child, according to the English case of *Hall v. Hollander*, 4 Barn. & C. 660, though I should think it quite questionable whether that case can be considered as law here. If the defendants were, in truth so reckless of the child's safety as to run over it in the way described, after knowing it to be in the road, the verdict is none too large. But such trifling with human life ought not to be presumed; and there was no proof of it, either direct or circumstantial. This is not a case, however, for interfering upon the ground of excessive damages. The only question which seems to be open for our consideration is that of negligence. This respects both parties. It is quite necessary to drive at a moderate pace, and look out against accidents to children and others, in a populous village or city. See *McAlister v. Hammond*, 6 Cow. 342, and per *LAWRENCE, J.*, in *Leame v. Bray*, 3 East, 597. But this accident happened in the country, where was a solitary house. A child belonging to it happened to be in the road, a thing most imprudently allowed by its parents, and what could have been easily prevented by ordinary care. Travelers are not prepared for such things. They therefore trot their horses. They are warrantably inattentive to small objects in the road, which they may be incapable of seeing, in the course of a drive for miles through the country among a sparse population. To keep a constant lookout would be more than a driver could do, even if he were continually standing and driving on a walk. Yet to this the matter must come, if he is to take all the responsibility. The roads would thus become of very little use in the line for which they were principally intended.

It seems to me that the defendants exercised all the care which, in the nature of this case, the law required. If so, it is a case of mere unavoidable accident, for which they are not liable. *Dygert v. Bradley*, 8 Wend. 469, 472, 473; *Clark v. Foot*, 8 Johns. 329; *Panton v. Holland*, 17 Johns. 92.

Was the plaintiff guilty of negligence? His counsel seemed to think he made a complete exception to the general rule demanding care on his part, by reason of his extreme infancy. Is this indeed so? A snow path in the public highway is among the last places in this country to which such a small child should be allowed to resort, unattended by any one of suitable age and discretion. The custody of such a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed, in the road, as this child was, without gross carelessness. It is the extreme of folly even to turn domestic animals upon the common highway. To allow small children to resort there alone is a criminal neglect. It is true that this confers no right upon travelers to commit a voluntary injury upon either, nor does it warrant gross neglect; but it seems to me that to make them liable for anything short of that would be contrary to law. The child has a right to the road for the purpose of travel, attended by the proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled that, if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels, (*Rathbun v. Payne*, 19 Wend. 399; *Burckle v. Dock Co.*, 2 Hall, 151;) which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveler or for the purpose of pursuing his sports. The application may be harsh when made to small children, as they are known to have no personal discretion. Common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. Suppose a hopeless lunatic, suffered to stray by his committee, lying in the road like a log, shall the traveler whose sleigh unfortunately strikes him be made amenable in damages? The neglect of the committee to

whom his custody is confided shall be imputed to him. It is a mistake to suppose that because the party injured is incapable of personal discretion he is therefore above all law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wend. 391, 394. And, when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria*. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian than that the latter should negligently allow his ward to be in the way of travelers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct. The counsel for the plaintiff probably have the advantage of saying that the neglect of an infant has not, in any reported case, ever been allowed by way of defense in an action for negligently injuring him. But so far there is an equal advantage on the other side. The defense has not been denied in any book of Reports. The defendant has also another advantage. The Reports expressly say that negligence may be predicated of an infant or lunatic. All the cases agree that trespass lies against an infant. That was adjudged in *Campbell v. Stakes*, 2 Wend. 137, and *Bullock v. Babcock*, before cited. And it is equally well settled that where an injury is free from all negligence, as if it arise from inevitable accident, there trespass does not lie. *Weaver v. Ward*, Hob. 134; *Marcy, J.*, in *Bullock v. Babcock*, 3 Wend. 393; *Dygart v. Bradley*, before cited.

The cases maintaining trespass against an infant, therefore, imply that he may be guilty of negligence. Trover will also lie for a mere non-feasance, *e. g.*, a non-delivery of goods, where they do not come to the infant's hands by contract. *LAWRENCE, J.*, in *Jennings v. Rundall*, 8 Term R. 337; *Campbell v. Stakes*, 2 Wend. 143. The cases most favorable to infants all agree in that; and so, where the contract of bailment to an infant has expired, it was agreed that, on non-delivery, the owner may maintain detinue, replevin, or trover. *Penrose v. Curren*, 3 Rawle, 351; and see per *ROGERS, J.*, *Id.* 354. It was said trespass lies against an infant, though only four years of age, (25 Hen. VI. 11b, per *WANGFORD*.) though this is put by *Brooke* with a *quære*. *Brooke, Abr.* "Corone," pl. 6. No doubt, however, he may bring a suit at any age; and, if that suit depends upon a condition on his side, he must show that it was performed. It was said in *Stowel v. Zouch*, Plow. 364, if an infant lord, who has title to enter from mortmain, does not enter within the year, he shall be bound by his laches; "for there he had but title to a thing which never was in him." To warrant an action he must have entered within the year, and, not having done so, he could have no remedy. Several like instances are put in the same page, which are also collected and arranged in 9 Vin. Abr. "En-

fant," B 2, pls. 7, 8, p. 376, of the octavo edition. But it is plain, in the nature of things, that, if an infant insist on a right of action, he must show a compliance with the conditions on which his right is to arise, and this is entirely irrespective of his age. Lands descend to an infant of a year old, and he is bound to make a share of the partition fence. He neglects to do so, whereby his neighbor's cattle enter and trespass upon the land. No one would think of contending that his neighbor must therefore be deprived of his defense. The infant has neglected to fulfill the condition on which he could sue, or his guardian has done so, which is the same thing. He might as well sue because his neighbor had left a gate on his own premises open, through which the infant had crept, and fallen into a pit and hurt himself. The man has a right to keep his gate open, and the child's parents must keep him away. But one has no plainer right to walk about his own premises, and open and shut his own gates, than he has to travel in the highway with his horses. An infant creeps into the track from your field to your barn, and is injured by your driving a load of hay along the path; are you to be deprived of all excuse in an action for the injury? The argument for this plaintiff goes quite too far and proves too much. It was said that drivers are bound to suppose that small children may be in the road, and, as all the care lies on the side of the former, damages follow of course for every injury to the latter. Suppose an infant suddenly throws himself in the way of a sleigh, a wagon, or a railroad car, by which his limb is fractured, it may be said, with equal force, he is incapable of neglect. So if he be allowed to travel the road alone in the dark. The answer to all this is, the law has placed infants in the hands of vigilant, and generally affectionate, keepers, their own parents; and if there be any legal responsibility in damages, it lies upon them.

The illustration sought to be derived from the law in respect to the injury of animals turned or suffered to stray into the street does not strike me as fortunate. If they be there without any one to attend and take care of them, that is a degree of carelessness in the owner which would preclude his recovery of damages arising from mere inattention on the side of the traveler. Indeed, it could rarely be said that animals entirely unattended are lawfully in the roads or streets at all. They may be driven along the road by the owner or his servants; but if allowed to run at large for the purpose of grazing, or any other purpose, entirely unattended, and yet travelers are to be made accountable in all cases of collision, such a doctrine might supersede the use of the road, so far as comfort or expedition is concerned. The mistake lies in supposing the injury to be willful, to arise from some positive act, or to be grossly negligent. Such an injury is never tolerated, be negligence on the side of the party injured what it may. *Clay v. Wood*, 5 Esp. 44; *Rathbun v. Payne*, before cited. But where it arises from mere inadvertence on the side

of the traveler, he is always excused by the law on showing that there was equal or greater neglect on the side of his accuser.

It is impossible to say, then, that the accuser was not himself the author of the injury which he seeks to father upon another. My difficulty in the case at bar is to find the least color for imputing gross negligence, or, indeed, any degree of negligence, to the defendants. But, if there were any, there was, I think, as much and more on the side of the plaintiff. It therefore seems to me that here was a good defense established at the trial, on the ground that the defendants being free from gross neglect, and the plaintiff being guilty of great neglect on his part,—indeed, being unnecessarily, not to say illegally, occupying the road, having no right there, (for he does not appear to have been traveling, or even on the land which belonged to his family,)—the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others.

Again, I collect from the evidence that Newell had demised the team for a term of two years, which was unexpired at the time of the injury, to his son-in-law and co-defendant, Roper. Newell then had no control of the team, and cannot be made liable without proof of positive and active concurrence in the injury,—a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one. He, at least, should have been acquitted by the jury. He neither actually participated in the management of the team nor could his interference have been legally efficient to prevent mischief. He had no lawful control of the horses. Roper was the exclusive owner *pro hac vice*. The evidence, at the time when the motion was made to allow the jury to pass upon the case of Newell, had made out nothing actual against him, if Roper, the driver, may be said to have been implicated as a wrong-doer. But Newell might, at this stage, perhaps have been regarded by the jury as owner of the horses, and Roper as his servant. The lease was not in proof. Constructively, his liability would follow from the neglect of his servant; and in this view it cannot be said there was no evidence against him. It is only where the evidence totally fails as to one whose case can be separated from the other that he is entitled to be acquitted for the purpose of being sworn as a witness for his co-defendant.

The motion for a nonsuit, which followed, seems to have been the more proper one; for I have been utterly unable to see that, so far, the evidence had made out any neglect, or the semblance of neglect, on the part of the defendants, while it had established clear neglect on the other side. But this question has been sufficiently dwelt upon in connection with the defendants' proofs, and that which the plaintiff adduced, at the close of the cause. It was enough if the cause of action was then made out, although the judge might have refused to nonsuit. It appears to me it was not. It follows that a new trial

should be granted. The costs should, I think, abide the event; for the judge erred in omitting to nonsuit the plaintiff. The case was certainly not made better for the plaintiff by the subsequent evidence. It is not, therefore, merely the case of a verdict against the weight of evidence, which calls for payment of costs.

New trial granted, costs to abide the event.

(52 N. J. Law, 446, 19 Atl. Rep. 1102.)

NEWMAN v. PHILLIPSBURG HORSE-CAR R. Co.

(Supreme Court of New Jersey. June 5, 1890.)

1. NEGLIGENCE — INJURIES TO CHILD — IMPUTED NEGLIGENCE.

An infant of tender years is not to be charged with the negligence of the person having it in charge.

2. SAME—STREET RAILROADS.

The plaintiff, about two years of age, being under the care of her adult sister, wandered onto the track of the horse railroad, and was there run over by the carelessness of the driver of the car. *Held*, that plaintiff's right of action was not lost, even if the sister's carelessness of supervision, in part, was the cause of her injury.

(Syllabus by the Court.)

Case certified from circuit court, Warren county; before Chief Justice BEASLEY.

The plaintiff was a child 2 years of age. She was in the custody of her sister, who was 22. The former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburgh. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car; the driver being in the car, collecting fares. The circuit judge submitted the three following propositions to this court for its advisory opinion, viz.: "*First*, whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff; *second*, whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of was not so demonstrably negligent that the said circuit court should have nonsuited the plaintiff, or that the court should have directed the jury to find for the defendant; *third*, whether a new trial ought not to be granted on the ground that the damages awarded are excessive."

Argued November term, 1889.

Shipman & Son, for plaintiff. *William H. Morrow*, for defendant.

BEASLEY, C. J., (after stating the facts as above.) There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper*, reported in 21 Wend. 615. This case appears to have been one of first impression on this sub-

ject; and it is to be regarded not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to; for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that, as the child was permitted by its custodian to wander into a position of such danger, it was without remedy for the hurts thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that consequently, by force of the well-known rule under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian; and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it; the premise being that the child must be in the care and charge of an adult, and the inference being that for that reason the neglects of the adult are the neglects of the infant. But surely this is conspicuously a *non sequitur*. How does the custody of the infant justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident of this office of the adult, but on the contrary is quite inconsistent with it; for the power to protect is the opposite of the power to harm, either by act or omission. In this case, in 21 Wend. 615, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a

railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds: *First*, the contract would be *contra bonos mores*; and, *second*, because the mother was not the agent of the child, authorized to enter into the agreement. Nevertheless the position has been deemed defensible, that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: "The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage," 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondent superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who of course can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot with any show of reason be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian: "You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress." But when such wrong-doer says to the infant: "Your guardian and I, by our joint misconduct, have brought this loss upon you; consequently, you have no right of action against me, but you must look for indem-

nification to your guardian alone,"—a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent; the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection, or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action

against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decisions, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinions touching the subject just discussed are in a state of direct antagonism, and it would therefore serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become in any wise a tortfeasor by imputation. 1 Shear. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood, Ry. Law, 1284. In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the circuit court be advised to render judgment on the finding of the jury.

(The following cases follow *Hartfield v. Roper*, 21 Wend. 615; *Casey v. Smith*, 152 Mass. 294, 25 N. E. Rep. 734; *Wright v. Railroad Co.*, 4 Allen, 283; *O'Brien v. McGlinchy*, 68 Me. 552; *Fitzgerald v. Railroad Co.*, 29 Minn. 336, 13 N. W. Rep. 168; *Mangum v. Railroad Co.*, 38 N. Y. 455. The following cases are to the contrary: *Railroad Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. Rep. 269; *Daley v. Railroad Co.*, 26 Conn. 591; *Wymore v. Mahaska Co.*, 78 Iowa, 396, 43 N. W. Rep. 264; *Railroad Co. v. Snyder*, 13 Ohio St. 408; *Winters v. Railroad Co.*, 99 Mo. 509, 12 S. W. Rep. 652; *Shippy v. Au Sable*, [Mich.] 48 N. W. Rep. 584; *Railroad Co. v. Wilcox*, [Ill. Sup.] 27 N. E. Rep. 899; *Robinson v. Cone*, 22 Vt. 214.)

5. Imputation of negligence to passenger—Former English doctrine now overruled.

(L. R. 13 App. Cas. 1.)

MILLS et al. v. ARMSTRONG et al.

THE BERNINA.

(House of Lords. Feb. 24, 1888.)

1. NEGLIGENCE—CONTRIBUTORY—IMPUTED TO PASSENGER.

The negligence of the persons in charge of a public conveyance cannot be imputed to a passenger therein who is injured by the joint negligence of such persons and those in charge of another conveyance, to defeat his action against the latter. *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Railroad Co.*, L. R. 10 Exch. 47, overruled.

2. SAME—COLLISION CAUSING DEATH.

A collision occurred between two steam-ships through the negligence of the masters and crews of both vessels; and a passenger and one of the crew of one steam-ship, neither of whom had any thing to do with the negligent navigation, were drowned. *Held*, that actions would lie against the owners of the other vessel to recover for such deaths, under a statute (9 & 10 Vict. c. 93) giving a right of action to personal representatives of a deceased person for injuries causing his death, and that the admiralty rule of half damages was not applicable.

Appeal from court of appeal.

Actions by the personal representatives of J. H. Armstrong and M. A. Toeg against the owners of the steam-ship *Bernina*, to recover for the death of such persons, caused by injuries received in a collision between the steam-ships *Bernina* and *Bushire*, which collision was due to the negligence of the officers and crews of both

vessels. The action was bought in admiralty under "Lord Campbell's Act," (9 & 10 Vict. c. 93.) which gives a right of action to the personal representatives of a deceased person for injuries causing his death. At the time of the collision Armstrong was the first engineer of the *Bushire*, and Toeg was a passenger thereon, but neither of them had anything to do with the negligent navigation of the vessel. The court below gave judgment for defendants on the authority of *Thorogood v. Bryan*, 8 C. B. 115. On appeal, the judgment was reversed by the court of appeal, which overruled *Thorogood v. Bryan*. Defendants appealed.

Sir Walter Phillimore and *J. Gorell Barnes*, for appellants. *Mr. Bucknill, Q. C.*, (*A. E. Nelson*, with him,) for respondents.

LORD HERSCHELL. My lords, this appeal arises from a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives, and who, it is alleged, lost their lives through the negligence of the appellants. The appellants are the owners of the steam-ship *Bernina*, between which vessel and the steam-ship *Bushire* a collision took place, which led to the loss of 15 persons who were on

board the latter vessel. It is admitted that the collision was caused by the fault or default of the masters and crews of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*.

The question arises whether, under these circumstances, the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *prima facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor, again, do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts; as, e. g., the relation of master and servant, or employer and agent, acting within the scope of his authority. But they rest their defenses solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan*, 8 C. B. 115, which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but, though it was early subjected to adverse criticism, it has never come for revision before a court of appeal until the present occasion. That action was one brought under Lord Campbell's act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that, "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the curb to put the deceased down, or want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant." The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this conclusion was arrived at. COLMAN, J., said: "It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself

with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling that want of care of the driver will be a defense of the driver of the carriage which directly caused the injury." MAULE and VAUGHN WILLIAMS, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." VAUGHN WILLIAMS, J., said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that he passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though, if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person, whose servants have been guilty of negligence, to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense, as against the passenger, when suing another wrong-doer. To say that it is a defense because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given

for the judgment in *Thorogood v. Bryan*. MAULE, J., says: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. But, as regards the present plaintiff, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess that I cannot concur in this reasoning. I do not think it well founded, either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance,—that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And, when it is attempted to apply this reasoning to passengers traveling in steam-ships or on railways, the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of CRESSWELL, J., in these words: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision, his master clearly could maintain no action; and I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case, have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory.

I will not detain your lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the court below, and especially with the very exhaustive judgment of the master of the rolls.

It was suggested in the course of the argument that *Thorogood v. Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would

have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defense on the merits if the facts had been properly averred. If, by a collision between two vehicles, a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defense, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defense is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood v. Bryan* be well founded.

I have said that the decision in *Thorogood v. Bryan* has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the master of the rolls. The result may be summarized thus: The learned editors of Smith's Leading Cases, Willes and Keating, J.J., strongly questioned the propriety of the decision. (See notes to *Ashby v. White*, 1 Smith, Lead. (Cas. 472.) Parke, B., whose *dictum* in *Bridge v. Railway Co.*, 3 Mees. & W. 244, Williams, J., followed in directing the jury in *Thorogood v. Bryan*, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in *The Milan*, Lush. 388, expressed strong disapproval of it; and though in *Armstrong v. Railway Co.*, L. R. 10 Exch. 47, it was followed, Bramwell and Pollock, BB., to say the least, did not indicate satisfaction with it. I understand my noble and learned friend Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland, the decision in *Thorogood v. Bryan* was pronounced unsatisfactory in *Adams v. Railway Co.*, 3 Ct. Sess. Cas. 4th Ser. 215. In America it has been followed in the courts of some States, but it has often been departed from; and, upon the whole, the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little v. Hackett*, (116 U. S. 366, 6 Snp. Ct. Rep. 391.) That was a decision of the supreme court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. FIELD, J., in delivering judgment, examined all the English and American cases, and the conclusion adopted was the same as that at which your lordships have arrived.

I have only this observation to add: The case of *Waite v. Railway Co.*, El. Bl. & El. 719, was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from *Thorogood v. Bryan*, and did not involve a review of that case. I think they were right.

As regards the other questions raised, I have only to say that I think they were properly dealt with by the court below.

I am requested by my noble and learned friend Lord BRAMWELL, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make.

I move your lordships that the judgment of the court of appeals be affirmed, and the appeal be dismissed, with costs.

Order appealed from affirmed, and appeal dismissed, with costs.

(The authority of *Thorogood v. Bryan*, 8 C. B. 115, is also now generally denied in this country. See *Railroad Co. v. Steinbrenner*, 47 N. J. Law, 161; *Robinson v. Railroad Co.*, 66 N. Y. 11; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391; *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. Rep. 31, 33, 34; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. Rep. 690; *State v. Railroad Co.*, 80 Me. 430, 15 Atl. Rep. 36; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. Rep. 516; *Railroad Co. v. Hogeland*, 66 Md. 149, 7 Atl. Rep. 105; *Railroad Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. Rep. 519. See, however, *Brickell v. Railroad Co.*, 120 N. Y. 290, 24 N. E. Rep. 449.)

6. Effect of acting under stress of peril to human life.

(43 N. Y. 502.)

ECKERT v. LONG ISLAND R. Co.

(*Court of Appeals of New York*. Jan. 24, 1871.)

1. NEGLIGENCE—CONTRIBUTORY—EFFORT TO SAVE LIFE OF ANOTHER IN PERIL.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.

2. SAME—INSTRUCTIONS TO JURY.

Plaintiff's intestate, standing 50 feet from defendant's railroad track, suddenly discovered a small child on the track in front of an approaching train, and, without a moment's hesitation, ran to it, seized it, and threw it in safety from the track, but was struck and killed by the engine. *Held*, in an action to recover damages for his death, that the court properly refused to charge that, if the deceased placed himself in peril from which he received the injury to save the child, plaintiff could not recover, but properly left to the jury the question of whether the negligence of intestate contributed to his injury.

ALLEN and FOLGER, JJ., dissenting.

Appeal from supreme court, general term, second district.

Action brought in the city court of Brooklyn by Anna Eckert, as administratrix of Henry Eckert, deceased, against the Long Island Railroad Company, to recover damages for the death of her husband, caused by the alleged negligence of defendant. The testimony of plaintiff's witnesses showed that the intestate, while standing talking with a companion about 50 feet from defendant's track in East New York, suddenly discovered a child three or four years old on the track at a crossing in front of a rapidly approaching train, and he immediately ran and seized it and threw it from the track, but before he could get clear of the track was struck by the locomotive and killed. Plaintiff's witnesses testified that the train was running at full speed, and that no signal was given, which was denied by defendant's witnesses. Defendant asked a nonsuit on the ground of the contributory negligence of intestate, which was refused. The court also refused to charge, at defendant's request, that if deceased voluntarily placed himself in peril, from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover, and submitted to the jury the question whether the negligence of deceased contributed to the accident. Defendant duly excepted. Verdict and judgment for plaintiff, which

was affirmed upon appeal to the supreme court. Defendant appealed.

Aaron J. Vanderpoel, for appellant.
George G. Reynolds, for respondent.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a recovery for an injury so received; but when the

exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was therefore properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running requires no discussion. None of the exceptions taken to the charge

as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed, with costs.

CHURCH, C. J., and PECKHAM and RAPALLO, JJ., concur.

ALLEN, J., wrote a dissenting opinion, in which FOLGER, J., concurred.
Judgment affirmed.

(See, also, *Spooner v. Railroad Co.*, 115 N. Y. 22, 21 N. E. Rep. 696; *Linnehan v. Sampson*, 126 Mass. 506; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Cottrill v. Railroad Co.*, 47 Wis. 634, 3 N. W. Rep. 376.)

IV. LIABILITY OF A MASTER FOR THE NEGLIGENCE OF HIS SERVANT.

(64 N. Y. 129.)

ROUNDS v. DELAWARE, L. & W. R. Co.

(*Court of Appeals of New York*. Feb. 1, 1876.)

1. MASTER AND SERVANT—LIABILITY FOR WRONG DONE BY SERVANT.

The master is responsible *civilliter* for the wrongful act of his servant, causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him; and if, in the line of his duty, he is authorized to use force, the master commits it to him to decide what degree of force he shall use, and is liable if, by his misjudgment and violence of temper, a degree of force is used, even though willfully and recklessly, which is not required by the necessity of the occasion, and a third person is thereby injured. If, however, the servant, under guise and cover of executing his master's orders, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, the master is not liable.

2. SAME.

In an action for personal injuries received by being run over by defendant's train, it appeared that plaintiff, a boy of 12 years, wrongfully on the platform of defendant's baggage-car, being told by the baggageman to get off while the train was in motion in the switch-yard, and protesting on account of the danger from wood-piles lying along the track, was kicked off by the baggageman, and, striking the wood pile, rolled under the train and was injured. Defendant had posted rules forbidding all persons not employes to ride on the baggage-car, and requiring the baggageman to rigidly enforce them. *Held*, that it was a question for the jury whether the baggageman acted in the line of his duty, or willfully and maliciously, outside of and in excess of his duty, and a finding for plaintiff should not be disturbed.

Appeal from supreme court, general term, third department.

Action by George M. Rounds, by guardian, etc., against the Delaware, Lackawanna & Western Railroad Company, for injuries sustained by plaintiff by being kicked off of one of defendant's baggage-cars by the baggageman. Plaintiff, a boy 12 years of age, jumped on the platform of the baggage-car in an empty train while it was being switched in defendant's yard, and, being found by the baggageman while the train was in motion, was ordered off; but, being unable to jump off without great danger from wood-piles on the side of the track, told the baggageman

of such fact; whereupon the baggageman kicked him off, and plaintiff, striking against the wood-pile, rolled under the car, and his leg was crushed. A printed notice was posted up in the baggage-car, and another near where plaintiff was standing, as follows: "No person will be allowed to ride on the baggage-car except the regular trainmen employed thereon. Conductor and baggageman must see this order strictly enforced." The posted time-cards contained another notice, as follows: "Train baggagemen must not permit any person to ride in the baggage-car except the conductor and newsagent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule." Defendant asked a nonsuit on the ground that plaintiff was a trespasser, and was guilty of contributory negligence, and that the act of the baggageman was willful and outside the line of his employment; which the court denied, ruling that it was a question for the jury whether the baggageman was acting within the authority of the company in putting plaintiff off, and whether he acted willfully and wrongfully, to which defendant excepted. The court charged the jury that plaintiff was a trespasser on the car, but if the baggageman, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, defendant was liable; and also that, if the baggageman pushed plaintiff off the train, and, in doing so, was acting as the employe of defendant, in good faith, in the discharge of a duty he owed the company, defendant would be liable for the careless and negligent discharge of duty; but if he was acting willfully and maliciously towards plaintiff, outside of and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which defendant excepted, and requested the court to modify the charge, or to charge that defendant was not liable if the baggageman acted willfully and wantonly, without authority from defendant. Verdict and judgment for plaintiff. On appeal the judgment was affirmed by the general term. 3 Hun, 329. Defendant again appealed.

Francis Kernan, for appellant. E. H. Prindle, for respondent.

ANDREWS, J. There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In *Higgins v. Turnpike Co.*, 46 N. Y. 23, this subject was considered by this court, and the rule was declared to be that the master was responsible *civilliter* for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized; and when exercised becomes, as to third persons, the discretion and act of the master; and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases, where the master has been held liable for the negligent or tortious act of the servant, the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the willful act of

the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

The case of *McManus v. Crickett*, 1 East, 106, turned upon the form of the action, and the distinction between trespass and case; but Lord KENYON in pronouncing the judgment of the court said: "Where a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in *Wright v. Wilcox*, 19 Wend. 343; and the master was held not to be responsible where the servant, in driving his master's wagon along the highway, willfully whipped up his horses while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over, and injured. The servant was cautioned by a by-stander that if he did not stop he would kill the boy. The court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a willful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said COWEN, J., "holds such a willful act a departure from the master's business." So in *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479, the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the court held that this was a willful trespass of the master, for which the defendant was not liable. In *Lyons v. Martin*, 8 Adol. & E. 512, it was held that where a servant, merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In *Mali v. Lord*, 39 N. Y. 381, the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant if he had been present, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what the master could not have done himself. See, also, *Bolingbroke v. Local Board*, etc., L. R. 9 C. P. 575. It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this State that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it ap-

pears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without authority, designed to do the act or the injury complained of. If he is authorized to use force against another, when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible; and, when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was sufficient to exempt the defendant from liability that the act of the baggageman in putting the plaintiff off the car was willful. He had already charged that if the baggageman acted "willfully and maliciously towards the plaintiff, outside of and in excess of his duty," in putting him off the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the baggageman acted willfully, although without malice, the point was not well taken. That the baggageman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a willful act which will exempt a master from liability for the tort of his servant must be done outside of his duty and his master's business. The charge was therefore strictly correct, and the exception was not well taken.

Neither was the defendant entitled to

have the court rule, as matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The baggageman, in kicking the boy from the platform, acted violently and unreasonably; and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the baggageman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was willful, within the rule we have stated. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must, ordinarily, be left to the jury to determine this issue upon a consideration of all the facts and circumstances proved. See *Jackson v. Railroad Co.*, 47 N. Y. 274. There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defense. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the baggageman by which his life was put in peril, and which resulted in his losing his limb. *Sanford v. Railroad Co.*, 23 N. Y. 243; *Lovett v. Railroad Co.*, 9 Allen, 557; *Holmes v. Wakefield*, 12 Allen, 580.

No error of law was committed on the trial, and the judgment of the general term should be affirmed, with costs. All concur.

Judgment affirmed.

(See, also, *Mott v. Ice Co.*, 73 N. Y. 543; *Quinn v. Power*, 87 N. Y. 535; *Limpus v. Omnibus Co.*, 1 Hurl. & C. 526; *Mitchell v. Crassweller*, 13 C. B. 237; *Cavanagh v. Dinsmore*, 12 Hun. 465; *Howe v. Newmarch*, 12 Allen, 49; *Walton v. Car Co.*, 139 Mass. 556, 2 N. E. Rep. 101; *Stone v. Hills*, 45 Conn. 44; *Railroad Co. v. Derby*, 14 How. 468.)

V. LIABILITY OF AN EMPLOYER FOR THE NEGLIGENCE OF A CONTRACTOR.

(101 N. Y. 377, 4 N. E. Rep. 755.)

HEXAMER v. WEBB.

(*Court of Appeals of New York*. Feb. 9, 1886.)

1. NEGLIGENCE — LIABILITY OF EMPLOYER — CONTRACTOR OR SERVANT.

It is not enough, in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them.

2. SAME.

Defendant employed a person engaged in the roofing and cornice business to fix the cornice on his building so as to prevent pigeons making their nests under the eaves of the roof, the mode in which it was to be done and the means to be employed being left entirely to him, and no price being fixed. *Held*, that such person was an independent contractor, and, for injuries caused to third persons by the negligent construction of the scaffold used in the work, defendant was not liable.

3. SAME — NUISANCE.

A scaffold, constructed by suspending a ladder from the roof of a building, for the purpose of making improvements thereon, the building being 15 feet from the line of the sidewalk, is not *per se* a nuisance.

4. SAME — CITY ORDINANCE.

A scaffold suspended from the roof of a building, for the purpose of making repairs thereto, not over the line of the sidewalk, is not within the meaning of a city ordinance forbidding the hanging of any goods, wares, and merchandise, or any other thing, in front of any building.

Appeal from court of common pleas of city and county of New York, general term.

Action by Bianca Hexamer against William H. Webb for injuries caused by the alleged negligence of defendant. The complaint was dismissed at the trial. The general term affirmed the judgment of dismissal, and plaintiff appealed.

I. T. Williams, for appellant. *George S. Hamlin*, for respondent.

MILLER, J. This action was brought by the plaintiff to recover damages alleged to have been sustained by means of the negligence of defendant's agents and servants in making repairs and improvements upon the hotel of the defendant, situated in the city of New York. The alleged negligence consisted in fixing and securing the staging used in performing the work, and the proof showed that the ladder, used as a scaffold, was suspended from the roof, over the eaves of the hotel, and that upon it were placed planks which were used as a platform upon which the workmen employed stood to do the work. This scaffold was moved from time to time, around the bay windows, from place to place. A heavy wind was blowing, and, while shifting the ladder, a gust came, and the working of the wind and the grating against the cornice and wall cut the rope which held the planks on the ladder, and the wind turned the planks up so that they fell, and one of them, in falling to the sidewalk, bounded, and struck the plaintiff.

One Burford, who was engaged in the roofing and cornice business, was employed by the defendant to do the work, which was intended to obviate a difficulty caused by the pigeons making their nests under the eaves of the roof of the hotel. At the close of the testimony a motion was made to dismiss the complaint, upon the ground, among others, that if there was proof of negligence it was not the negligence of the defendant, or his agents or servants, but of an independent contractor; and the plaintiff's counsel then asked to go to the jury upon several grounds, which were stated and refused. The motion to dismiss the complaint was granted, and the defendant's counsel excepted to the decision of the court.

The employment of Burford was of a general character, and the contract between him and the defendant was not restricted as to time or amount, or the specific services which were to be rendered. The accident occurred while Burford and his men were engaged in the performance of this work, and this action was sought to be maintained upon the ground that the workmen employed, including Burford, were the servants of the defendant, and that the defendant, as owner of the real estate, was responsible to third persons for the carelessness, negligence, or want of skill in those who were carrying on or conducting the business; and this, whether the persons employed were working for wages or on contract. We think that the principle laid down has no application to the facts presented in the case at bar. As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor, and the owner is not liable for his acts, or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same, without any specific arrangement as to terms and conditions, such employment is in the nature of an independent contract, which imposes upon the employee the responsibility incurred by acts of negligence caused by himself, or those who are aiding him in the performance of the work. It is absolutely essential, in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist.

In *King v. Railroad Co.*, 66 N. Y. 181, 184,

the rule applicable to such a case is laid down by ANDREWS, J., as follows: "It is not enough, in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another." In the case considered we think that, by the contract between the defendant and Burford, the relation of master and servant was not created. Burford was a mechanic, engaged in a particular kind of business, which qualified him for the performance of the work which he was employed to do. By the arrangement with the defendant, he was an independent contractor, engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done, and the means to be employed in its accomplishment, were left entirely to his skill and judgment. Everything connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford or the conduct of the work. It was the result which was to be attained that was provided for by the contract, without any particular method or means by which it was to be accomplished. So long as the contractor did the work, the defendant had no right to interfere with his way of doing it. The fact that no price was fixed, and no specifications made as to the work to be done, did not render the contract one of mere hire and service, or create the relation of master and servant between the parties. It cannot, we think, be said that Burford did not agree to do the work required of him, and that no contract was made. After the subject-matter and the difficulties attending the work had been considered and talked about, Burford said he would try and do something, and the defendant replied that he did not care how he did it. The conversation had amounted in law to an agreement that Burford would perform all the work that was required of him, according to his own judgment as to what was necessary to be done to accomplish the object intended. He was an independent contractor, and the men employed by him were his servants, and had nothing to do with the defendant. Burford was not the agent of the defendant, in any sense, in purchasing the material, or in hiring the men to do the work. That the work was charged for by the day could make no difference, and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, or authority to hire or discharge the men, or render him in any way liable to them instead of Burford. It is very evident that the men employed were the servants of Burford, and therefore the defendant cannot

be made responsible for their negligence. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Shear. & R. Neg.* § 76.

In *Blake v. Ferris*, 5 N. Y. 58, within the rule last stated, it is held that when a man is employed in doing a job or piece of work with his own means and his own men, and employs others to help him or to execute the work for him, and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. Upon these authorities, there would seem to be no question as to the character of Burford's employment.

We are referred by the learned counsel for the appellant to numerous authorities as upholding the doctrine that Burford was not engaged in an independent employment, and that the defendant was therefore liable. After a careful examination, we are satisfied that none of them sustain this position. Those cited from this state are certainly in a contrary direction. The other cases cited are clearly distinguishable from the case at bar, and establish no rule adverse to that which is supported, as we have seen, by the authorities in this state.

The claim that the ladder or scaffold suspended under the eaves of the hotel was a nuisance is not well founded. The proof on the trial did not show that the building was on the line of the street. It did show that the hotel was separated from the sidewalk by an area of 15 feet. Without further proof, it is difficult to see how the ladder or staging could be regarded as such an obstruction to the street as to constitute a nuisance. The action is based upon the ground of negligence, and there is nothing in the complaint alleging that the scaffold was suspended over the sidewalk, or was in any respect an obstruction to the street. The gist of the action is negligence and unskillfulness in the construction of the scaffolding. It may be added that the scaffold itself was suspended for a legitimate purpose, connected with the reparation and improvement of the building. It was not necessarily injurious and dangerous, or an obstruction on the street; and, if properly used, might well be employed for the purpose intended. It could only become dangerous by being improperly constructed, or by some wrongful and willful act. In view of all the facts, it cannot, we think, be maintained that the scaffold necessarily was a nuisance.

The claim that the ladder was suspended in violation of the city ordinance is not well founded. The ordinance referred to prohibits the hanging of any goods, wares, merchandise, or any other thing, in front of any building at a greater distance than

one foot. The ordinance was aimed against the obstruction of the streets. It is not apparent that the ladder overhung the street; but, even if such was the case, it was a mere temporary structure, erected for the purpose of repairing the building, and not an obstruction within the meaning and spirit of the ordinance, which it is manifest was directed against goods, etc., which were exposed for sale, or for the purpose of attracting public attention thereto. The construction contended for would prevent the use of scaffolds in the reparation of buildings, which never could have been intended.

It is also insisted that the work in question was intrinsically dangerous, and hence the party authorizing it would be liable, whether he did the work himself or let it out on contract. The answer to this position is that the work itself was not necessarily injurious or dangerous. It was merely necessary repairs or improvements for the benefit of the building, which, under ordinary circumstances, could be made without any serious results. The accident was caused by a gust of wind, which might well occur in the performance of any work of a similar character, and which could not well be guarded against or provided for. The act itself could only become dangerous and cause injury by some unforeseen circumstance, and the rule stated is not applicable.

There is, we think, no force in the posi-

tion that the injury complained of was the result of an act absolutely necessary for the contractor to do in order to accomplish the desired end, and the suspending of the ladder may therefore be said to have been done by the defendant, and he is liable, although it was done by an independent contractor. It is apparent, from the evidence, that the injury resulted, not from anything contracted for by the defendant, but something collateral thereto. The defendant's contract related to the improvement of the building alone. What was necessary to be done for that purpose, and the manner in which it should be done, rested with the skill and judgment of the contractor. The defendant was absent at the time, and had no knowledge of what was done, or the manner in which it was done. The doing of the work, and the mode in which it was to be accomplished, were matters collateral to the contract between the defendant and Burford. For these the defendant could not be held responsible.

After a careful consideration of the questions presented, it follows that no error was committed by the judge in dismissing the complaint, or in his refusal to allow the case to go to the jury; nor did he err, upon the trial, in striking out the testimony given as to the declaration of one of the witnesses sworn upon the trial. The judgment should be affirmed. All concur. Judgment affirmed.

(See, also, *Cuff v. Railroad Co.*, 35 N. J. Law, 17; *Hilliard v. Richardson*, 3 Gray, 349; *Chicago v. Robbins*, 2 Black, 418; *Edmundson v. Railroad Co.*, 111 Pa. St. 316, 2 Atl. Rep. 404; *Railroad Co. v. Hanning*, 15 Wall. 649; *Overton v. Freeman*, 11 C. B. 867; *McCafferty v. Railroad Co.*, 61 N. Y. 178; *Ellis v. Gas Co.*, 2 El. & Bl. 767.)

VI. LIABILITY OF MASTER TO HIS SERVANT.

(99 N. Y. 363, 2 N. E. Rep. 24.)

PANTZAR V. TILLY FOSTER MIN. CO.

(*Court of Appeals of New York*. June 9, 1885.)

1. MASTER AND SERVANT—NEGLIGENCE OF VICE-PRINCIPAL.

A master must exercise reasonable care to provide for his servant suitable tools and implements, a proper place to work in, competent fellow workmen, when needed, etc., and cannot delegate the performance of these duties to a superintendent or other employe, so as to exonerate himself from liability to a servant who has been injured by their non-performance.

2. SAME—ASSUMPTION OF RISK OF SERVICE.

The rule that the servant takes the risk of the service presupposes that the master has performed the duties of care, caution, and vigilance which the law casts upon him.

3. SAME.

Plaintiff, while employed in defendant's mine in constructing a wall, was injured by the fall of a mass of rock from an overhanging cliff. There was evidence, on the trial of his action to recover for such injuries, that a seam had been discovered in the cliff where the rock broke off, which defendant's superintendent had knowledge was increasing in width, that it would have been practicable to support such rock, that plaintiff had no knowledge of the danger, and that the superintendent did not take proper precautions to protect the workmen from injury from this cause. *Held*, that a verdict for plaintiff should not be disturbed.

Appeal from supreme court, general term, first department.

Action by Gustav Pantzar against the Tilly Foster Iron Mining Company for injuries alleged to have been caused by negligence of defendant. Verdict and judgment for plaintiff. On appeal to the general term the judgment was affirmed. Defendant again appealed.

Luther R. Marsh, for appellant. *J. Edward Swanstrom*, for respondent.

RUGER, C. J. The general principles upon which this action depends have been so frequently discussed in recent cases that anything more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties. *Coal Co. v. Reid*, 3 Macq. 275; *Laning v. Railroad Co.*, 49 N. Y. 522; *Brydon v. Stewart*, 2 Macq. 34; *Booth v. Railroad Co.*, 73 N. Y. 40. That "no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance." *Mann v. President, etc.*, 91

N. Y. 500; *Booth v. Railroad Co.*, supra. And that, when the general management and control of an industrial enterprise or establishment is delegated to a superintendent, with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517.

The case shows that the defendant was the owner of a coal mine in Putnam county, New York, conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work, and using all suitable measures and precautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant to recover damages for personal injuries received by him through the fall of a mass of rock, while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about 60 feet, and was still some 50 feet below the surface of the ground. While thus engaged with a number of other workmen a large mass was detached, and fell from the brow of the projecting cliff under which the work was in progress, and caused the death of some, and the serious injury of others, among whom was the plaintiff.

The evidence as to the condition of the rock at the time of the accident was conflicting, and raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints, and foliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating any immediate danger, and that no such indications had been observed before the accident.

On the other hand, the plaintiff's evidence showed that a large crack parallel with, and about 10 feet back from, the upper angle of the face of the cliff had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it

was increasing in width, and still they took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable, and frequently adopted in other mines. In some cases, braces of timbers, extending across from the side of the pit to the rock liable to fall, were used, and in others the overhanging rock had been blasted off. It was also shown that a wall such as that in process of construction would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall the crack disappeared. It must therefore be assumed, from the verdict of the jury, that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable, and of easy and safe application.

The evidence tended to show that the wall then in course of construction was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it, and its main design seemed to be to furnish a place for the deposit of refuse material. During the course of its erection it certainly afforded no protection to those working below the cliff, and the jury was authorized to infer, from the fact that it was not completed after the lapse of several years, that it was not originally designed as a means of present protection from the dangers of falling rock. The degree of vigilance and care required of a master in the adoption of means of protection towards his servants has been much discussed by elementary writers, as well as in reported cases, and the conclusions reached, applicable to such a case as the present, are not disputed. To accept the rule extracted from *Leonard v. Collins*, 70 N. Y. 90, and adopted in the appellant's brief, is to inquire whether "the master did everything which, in the exercise of reasonable and ordinary care and prudence, he ought to have done." "Did he omit any precaution which a prudent and careful man would take, or ought to have taken?" It is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case, and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case, as it was based, to some extent, upon evidence given subsequent to the taking of the exception. But as we think the judgment must, in any event, be affirmed, no injustice is done the plaintiff by considering all of the evidence taken on the trial in determining the validity of this exception.

The motion for a nonsuit was placed upon grounds stated concisely as follows: (1) That the accident causing plaintiff's injury was incident to the hazardous nature of his employment, and from a risk

assumed by him on entering upon it. (2) That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff. (3) That there being no proof of the incompetency of the superintendent, when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part causing injury to a fellow-servant. It may be said, with reference to the ground last stated, that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals, through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from, using proper precautions to protect his workmen from danger known to the master arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection, and frequent and careful examinations, and, upon the discovery of any indications of

danger, to adopt all suitable precautions to protect its servants from injury. The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care, and vigilance, which the law casts upon him. *Booth v. Railroad Co.*, supra. It is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master that the servant assumes. It was for an omission to observe the dangerous appearances to which the evidence shows its attention had been called, and its neglect to adopt suitable and proper means of protection, that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He therefore had a right to rely upon the performance of the duty owing by the master, of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion, and was liable to fall at any moment, and was therefore chargeable with the duty, in the exercise of reasonable care and prudence, of taking immediate steps to avoid the danger, and of warning the men working under it of the hazard to which they were exposed.

We therefore think that there was evidence sustaining the verdict of the jury, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

(See, also, *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Hough v. Railway Co.*, 100 U. S. 213; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. Rep. 449; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. Rep. 870; *Tuttle v. Railway*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Yeaton v. Railroad Corp.*, 135 Mass. 418; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; *Rogers v. Manufacturing Co.*, 144 Mass. 198, 11 N. E. Rep. 77; *Buzzell v. Manufacturing Co.*, 48 Me. 113.)

(5 Best & S. 570, L. R. 1 Q. B. 149.)

MORGAN V. VALE OF NEATH RY. CO.

(*Court of Queen's Bench.* July 4, 1864. *Exchequer Chamber.* Nov. 27, 1865.)

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—WHO ARE FELLOW-SERVANTS.

The rule which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages.

2. SAME—RAILROAD COMPANIES.

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.

3. SAME.

The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of the railway, while some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffolding, by which means the plaintiff was thrown down and injured. *Held*, on the above principle, that the company was not liable.

Rule nisi to enter verdict for plaintiff instead of a nonsuit.

Action by Morgan against the Vale of Neath Railway Company for injuries alleged to have been sustained by defendant's negligence. Plaintiff, at the time of the injury, was a carpenter in defendant's employ at weekly wages. The duties of the carpenters in the employment of the company were to perform all the carpenter's work they might be directed to do by the inspector of the line for the general purposes of the company. The court non-

sued plaintiff, but gave him leave to move to enter a verdict in his favor for an agreed sum. A rule *nisi* was accordingly obtained on the ground that there was no common employment, such as to exempt defendants from liability.

Mr. Giffard and S. W. Bowen, for plaintiff. G. B. Hughes, for defendants.

BLACKBURN, J. In this case the plaintiff was employed by the defendants as their servant to do work as a carpenter on their station while the railway traffic was being carried on in it by the servants of the defendants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turn-tables. The servants of the defendants, who were engaged in shifting a locomotive engine, allowed it to project so far beyond the turn-table that, in turning, the end of the engine struck against a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was thrown off and injured. The plaintiff was nonsuited, with leave to move to enter a verdict for the plaintiff.

It must be taken to have been proved at the trial that there was negligence on the part of those shifting the engine, and no contributing negligence on the part of the plaintiff, so that the plaintiff might have maintained an action against those actually shifting the engine, and also against their masters, the defendants, unless the fact that the plaintiff was also the servant of the defendants forms a defense; and the question of law reserved must be taken to be whether the nature of the plaintiff's employment was such as to make him and the servants, by whose negligence he suffered, servants in a common employment, or, as it is sometimes called, "collaborateurs," within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

I am of opinion that this rule ought to be discharged, as I think that the facts bring the case within the principle of the class of cases of which *Hutchinson v. Railway Co.*, 5 Exch. 343, was the first decided in an English court, but which had previously been acted upon in America in the case of *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, also printed in 3 Macq. 316. That principle I take to be that a servant, who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that the compensation was adjusted accordingly, or, in other words, that these risks are considered in his wages; and that where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master; and consequently

that he cannot recover against his master for an injury so caused, because, as is said by SHAW, C. J., in *Farwell v. Railroad Corp.*, he "does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, expressed or implied."

If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like, no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment.

No such point, however, arises in the present case. It was not suggested that the defendants negligently employed servants to manage their traffic who were not competent to do so, nor that the turn-tables were improperly made. The one point made was that the plaintiff, who was employed to do carpenter's work on the station, was not employed in the same work as those who were employed in working the railway traffic; and it was contended that it was essential that the servants should be in a common employment, and working for a common object. I quite agree that it is necessary that their employment must be common in this sense: that the safety of one servant must, in the ordinary and natural course of things, depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule.

In *Hutchinson v. Railway Co.*, 5 Exch. 343, the company's servant, who went as their servant in one of their trains, was, as one of the necessary and ordinary consequences of so doing, exposed to risk of injury from the negligence of those who worked the traffic; and the judgment of the court of exchequer, that his representatives could not recover against the company for his death caused by the negligence of their servants working the traffic, was on the principle I have just stated. His death was held to be caused by a want of skill, the risk of which the deceased had, as between himself and the defendant, agreed to run. I think it would be diffi-

cult to show that Hutchinson, and those who worked the train which ran into him, were engaged in any common service, in any sense of the word which would not include the present case.

In *Coal Co. v. McGuire*, 3 Macq. 300, Lord CHELMSFORD, C., in commenting on the cases on this subject, observes (pages 301-308) that in them "it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow-laborers in the same work; because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at." These observations were made in a case in which the house of lords reversed the decision of the Scotch court of session, who had held that the owners of the colliery were responsible to the miners whom they employed, for the negligence of their servant employed to work the engine which drew them up, on the ground that they were not servants employed in common work. All the law lords, in delivering their opinions that the court of session were wrong in this decision, concurred in saying that there was no inflexible rule of law releasing the master from responsibility in every case where the person injured by the negligence of his servant was at the time of the injury in the same master's service; and they certainly use language which, like part of what I have cited from Lord CHELMSFORD's opinion, seems to point to the common object of the service as being the limit of the rule; but, as was observed by Lord CHELMSFORD himself with reference to the former decision, there was nothing in the nature of the case before them to call for a precise definition of the limit; it was only necessary to decide that the case before them fell within it. I think, however, the principle which I consider the true one is sufficiently indicated by Lord CHELMSFORD in the passage I have just quoted, and by Lord CRANWORTH throughout his judgment in *Coal Co. v. Reid*, 3 Macq. 266. In *Waller v. Railway Co.*, 32 Law J. Exch. 205, POLLOCK, C. B., in his judgment refers to the observations thrown out by Lord CHELMSFORD, and the chief baron in effect

says that, in order to decide the case before him, he considers what are the dangers which any servant engages to encounter, and looks at the probable dangers attendant upon entering the engagement in question. This I think the true principle, and that the difficulty is to apply it in each case.

Applying that principle to the case before them, the court of exchequer decided that a guard of a railway train had taken upon himself the risk of injury from the negligence of the servants whose duty it was to see that the rails were in good order. And, applying the same principle to the present case, I think that we ought to hold that the plaintiff, in accepting an employment to work in the station while the traffic was being carried on, and which must have brought him close to the traffic, accepted one which necessarily must have exposed him to danger from the carelessness of those conducting the traffic, and must be taken, as between himself and his employers, to have taken upon himself that risk.

COCKBURN, C. J., and MELLOR, J., concurred.

Rule discharged.

On appeal to the exchequer chamber, the following opinions were rendered:

ERLE, C. J. I am of opinion that the judgment should be affirmed. The plaintiff was employed by the railway company to do carpenter's work, and he was so employed on the line of railway, and the wrong-doers were the porters, also in the employment of the company, who, in shifting a steam-engine on a turn-table close to the shed on which the plaintiff was working, managed the business so negligently that the engine struck against the ladder which partly supported the plaintiff's scaffolding, and threw the plaintiff violently to the ground. The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic. On a suggestion put by my Brother PIGOTT, Mr. Macnamara was driven to an answer which (if it did not admit that it was the same thing) showed that he had difficulty in establishing any distinction whether the plaintiff were working close by, or whether he were employed on the turn-table itself. I think it can make no difference, and the rule which exempts the master from liability to a servant for injury caused by the negligence of a fellow-servant applies. The principle on which this rule was established, as applicable to the present case, is very clearly put by BLACKBURN, J., in the judgment, to which MELLOR, J., agreed, in the court below: "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages. I think

that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The cases on this subject are extremely numerous, and have been closely examined, both here and in the court below, and I could not make the matter clearer by going through them. It is sufficient to say that I entirely agree with the judgment of the court below that the facts of the case bring it within the rule exempting the master from liability.

POLLOCK, C. B. I only wish to add a single sentence. It appears to me that we should be letting in a flood of litigation

were we to decide the present case in favor of the plaintiff; for, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shows that we must not refine, but look at the common object, and not at the common immediate object.

WILLES, BYLES, and KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

Judgment affirmed.

(See, also, *Farwell v. Railroad Corp.*, 4 Metc., Mass., 49; *Holden v. Railroad Co.*, 129 Mass. 268; *Wright v. Railroad Co.*, 25 N. Y. 562; *Brick v. Railroad Co.*, 98 N. Y. 211; *McAndrews v. Burns*, 39 N. J. Law, 117; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Lanning v. Railroad Co.*, 49 N. Y. 528; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. Rep. 371; *Wilson v. Merry*, L. R. 1 H. L. 326.)

INJURY CAUSING DEATH.

(95 U. S. 754.)

MOBILE LIFE INS. CO. v. BRAME.

(*Supreme Court of United States*. Jan. 21, 1878.)

1. DEATH—GROUND OF ACTION FOR DAMAGES.

At common law an act causing the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages.

2. SAME—REMOTENESS OF DAMAGE.

An insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, for the loss thereby caused the company, such loss being too remote and indirect.

Error to the circuit court of the United States for the district of Louisiana.

Action by the Mobile Life Insurance Company against Samuel D. Brame to recover the sum of \$7,000, the alleged loss sustained by plaintiff in the death of one Craven McLemore, willfully killed by defendant. The plaintiff had insured the life of McLemore, and its payment of such insurance was the alleged loss to plaintiff. Defendant's demurrer to the petition was sustained, and thereupon plaintiff sued out a writ of error.

Mr. Chas. E. Fenner, for plaintiff in error. Mr. John H. Kennard, contra.

HUNT, J. The argument of the insurance company is that the killing of the deceased was an injury to or violation of a legal right or interest of the company; that, as a consequence thereof, it sustained a loss, which is the proximate effect of the injury. The answer of the defendant is founded upon the theory that the loss is the remote and indirect result merely of the act charged; that at the common law no civil action lies for an injury which results in the death of the par-

ty injured; and that the statutes of Louisiana upon that subject do not include the present case. The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been so decided in many cases in the English courts, and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found. In *Hilliard on Torts* (page 87, § 10) the rule is thus laid down: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. *Baker v. Bolton*, 1 Camp. 493; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *Kramer v. Railroad Co.*, 25 Cal. 434; *Railroad Co. v. Keely*, 23 Ind. 133; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Yonge*, 15 Ga. 349; *Insurance Co. v. Frost*, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are *Cross v. Guthery*, 2 Root, 90; *Plummer v. Webb*, 1 Ware, 79; and *Ford v. Monroe*, 20 Wend. 210. They are considered by the New York court of appeals in *Green v. Railroad Co.*, *41 N. Y. 294, 2 Abb. Dec. 277, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. In that case the plaintiff alleged that on the 9th day of January, 1856, his wife was a passenger on the defendants' road, and by the gross carelessness and unskillfulness of the defendants a collision occurred, by means of which his wife was killed, "whereby he has lost and been deprived of all the com-

fort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," etc. A demurrer to this complaint, upon the ground that the facts alleged constituted no cause of action, was sustained by the New York court of appeals. In *Hubgh v. Railroad Co.*, 6 La. Ann. 495, the same principle was decided, and in the same manner. In giving its opinion, the court say: "The exception of the defendants presents the question whether the death of a human being can be the ground of an action for damages." Not being satisfied with this decision, Messrs. Ogden & Duncan asked for a rehearing, the argument for which is reported in the same volume, pp. 498-508. It was denied in an elaborate opinion by Chief Justice EUSTIS. In *Hermann v. Railroad Co.*, 11 La. Ann. 5, this principle was again affirmed in an opinion by Chief Justice MERRICK. It is only necessary to refer to one other case, involving the same principle as those already cited, but in its facts more closely resembling the case under consideration. In *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, supra, the declaration alleged that on the 20th day of March, 1850, the plaintiffs had outstanding and in force a policy of insurance for \$2,000 upon the life of Samuel Beach; that Beach was on that day a passenger on the defendants' road; that the defendants so carelessly, negligently, and unskillfully conducted themselves that the train on which Beach was riding was thrown down a bank into the river; that Beach was greatly wounded and bruised, by means whereof he then and there died, by reason of which the plaintiffs were compelled to pay to his administrators the sum of \$2,000 upon the said policy.

The allegation of the present plaintiffs is that Brame tortiously and illegally took the life of McLemore by shooting him. This is open to the inference that the act of Brame was felonious. The case in Connecticut is based upon the allegation of negligence and carelessness, and is the more favorable to a recovery, in that it avoids the suggestion existing in the present case, that the civil injury is merged in the felony. The supreme court of Connecticut held that the action could not be sustained. We have cited and given references to the important cases on this question; that they are substantially uniform against the right of recovery. Upon principle we think no other conclusion could be reached than that stated. The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by

him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. As in *Insurance Co. v. Boshier*, 39 Me. 253, where an insurance company brought suit against one who had willfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In *Ashley v. Dixon*, 48 N. Y. 430, it was held that if A. is under a contract to convey his land to B., and C. persuades him not to do so, no action lies by B. against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. *Grove v. Brandenburg*, 7 Blackf. 234; *Dunlap v. Glidden*, 31 Me. 435. And in *Anthony v. Slaid*, 11 Mete. (Mass.) 290, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of them, and he brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the town. Some text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine has been held.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir. By the act of parliament of August 26, 1846, (9 & 10 Vict.,) an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our states, and, among others, into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and, in default of these relatives, in favor of the surviving father and mother. Acts La. 1855, No. 223, p. 270. The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute.

In each of the briefs it is stated that the defendant was tried for the homicide, and acquitted. In the view we take of the case, the fact of a trial or its result is a circumstance quite immaterial to the present question, however important it may have been to defendant.

Judgment affirmed.

(See, also, *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140; *Carey v. Railroad Co.*, 1 Cush. 475; *Leonard v. Columbia, etc., Co.*, 84 N. Y. 48.)

FRAUD AND DECEIT.

I. ELEMENTS OF ACTION—FRAUDULENT INTENT.

1. English rule.

(L. R. 14 App. Cas. 337.)

DERRY *et al.* v. PEEK.

(House of Lords. July 1, 1889.)

1. FRAUD—WHEN ACTION OF DECEIT LIES.

To support an action of deceit to recover damages, plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

2. SAME.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.

3. SAME—PROSPECTUS OF COMPANY.

A special act incorporating a tramway company provided that the cars might be moved by animal power, and, with the consent of the board of trade, by steam power. The directors issued a prospectus, containing a statement that by their charter the company had the right to use steam power instead of horses. Plaintiff took shares on the faith of such statement. The board of trade afterwards refused their consent to the use of steam, and the company was wound up. *Held*, in an action of deceit against the directors founded upon the false statement, that defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true.

Appeal from court of appeal.

Action on the case brought by Sir Henry William Peek against William Derry, chairman, and J. C. Wakefield, M. M. Moore, J. Pethwick, and S. J. Wilde, four of the directors of the Plymouth, Devonport & District Tramways Company, for damages for alleged fraudulent misrepresentations of defendants whereby plaintiff was induced to take shares in the company. The company was incorporated in 1882 by special act, (45 & 46 Vict. c. 159,) which provided, *inter alia*, that the cars used on the tramways might be moved by animal power, and, with the consent of the board of trade, by steam or any mechanical power, for fixed periods, and subject to the regulation of the board. The tramways act of 1870 (33 & 34 Vict. c. 78) provides that all cars used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. In 1883 the defendants, as directors of the company, issued a prospectus containing the following paragraph: "One great feature of the undertaking, to which considerable importance should be attached, is that, by the special act of parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses; and it is fully expected that, by means of this, a considerable

saving will result in the working expenses of the line, as compared with other tramways worked by horses." Plaintiff, relying upon the representation of the right of the company to use steam or mechanical power, took shares in the company. Subsequently the board of trade refused to consent to the use of steam or other mechanical power, except on certain portions of the tramways, the result of which was that the company was wound up. Plaintiff brought this action of deceit. At the trial, before STIRLING, J., the action was dismissed; but, on appeal to the court of appeal, the decision below was reversed. Defendants appealed from the judgment of the court of appeal.

Sir Horace Davey, Q. C., and Mr. Moulton, Q. C., (M. Muir Mackenzie, with them,) for appellants. *Mr. Bompas, Q. C., and Mr. Byrne, Q. C., (Mr. Patullo, with them,)* for respondent.

LORD HERSCHELL. My lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made, in a prospectus issued by them, certain statements which were untrue; that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company. "This action is one which is commonly called an action of 'deceit,' a mere common-law action." This is the description of it given by CORROD, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone. It is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this, because observations made by learned judges in actions for rescission have been cited, and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even

if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this, it has been said that the circumstance that the answer was honestly made, in the belief that it was true, affords no defense to the action. Lord SELBORNE pointed out in *Brownlie v. Campbell*, L. R. 5 App. Cas. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the court of appeal in the case before your lordships. "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the chancery division or any of the common-law divisions; there being, in my opinion, no such thing as an equitable action for deceit." This was the language of COTTON, L. J., in *Arkwright v. Newbold*, 17 Ch. Div. 301. It was adopted by Lord BLACKBURN in *Smith v. Chadwick*, L. R. 9 App. Cas. 193, and is not, I think, open to dispute.

In the court below, COTTON, L. J., said: "What, in my opinion, is a correct statement of the law, is this: that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false,—that is, without any reasonable ground for believing it to be true,—he is liable in an action of deceit, at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned lord justice speaks of a statement made recklessly, or without care whether it is true or false,—that is, without any reasonable ground for believing it to be true,—I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from mak-

ing, through want of care, a false statement, which is nevertheless honestly believed to be true; and it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. That the learned lord justice thought that, if a false statement were made without reasonable ground for believing it to be true, an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated among persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others." The learned judge proceeds to say: "Although, in my opinion, it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty; that is to say, an untrue statement made, without any reasonable ground for believing that statement to be true; and, in my opinion, when a man makes an untrue statement, with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now, I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For, if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the lord justice distinctly says that, if there be such a departure from duty, an action of deceit can be maintained, though there be not what he should call fraud. I shall have by and by to consider the discussions which have arisen as to the difference between the

popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavor to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the court of appeal. Sir JAMES HANXEN says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is thereby damaged, the person so damaged is entitled to maintain an action for deceit." Again, LOPES, L. J., states what, in his opinion, is the result of the cases. I will not trouble your lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be in fact relied on by the person to whom it is made, may be sued by the person damaged thereby, "*fourthly*, if it is untrue in fact, but believed to be true, but without any reasonable ground for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground, for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true; but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, LOPES, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was, at all events, not so well settled but that a distinguished judge, GROSE, J., differing from his brethren on the bench, held that such an action was not maintainable. BILLER, J., who held that the action lay, adopted in relation to it the language of CROKE, J., in *Baily v. Mer-*

rell, 3 Bulst. 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur * * * an action lies." In reviewing the case of *Crosse v. Gardner*, Carth. 90, he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and, further, after pointing out that in *Risney v. Selby*, 1 Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so;" the latter words being specially emphasized. KENYON, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false. *Haycraft v. Creasy*, 2 East, 92, was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were: "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord KENYON thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges, thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defense.

I may pass now to *Foster v. Charles*, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the court, TINDAL, C. J., saying: "It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the ex-

pression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the chief justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Willfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. Charles, 7 Bing. 105, was followed in *Corbett v. Brown*, 8 Bing. 33, and shortly afterwards in *Polhill v. Walter*, 3 Barn. & Adol. 114. The learned counsel for the respondent placed great reliance on this case, because, although the jury had negatived the existence of fraud in fact, the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was that the defendant was not actuated by any corrupt or improper motive, for Lord TENTERDEN says: "It was contended that, * * * in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A willful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud, and for this position was cited *Foster v. Charles*, 7 Bing. 105, to which may be added the recent case of *Corbett v. Brown*, 8 Bing. 33. The principle of these cases appears to be well founded, and to apply to the present."

In a later case of *Crawshay v. Thompson*, 4 Man. & G. 357, MAULE, J., explains *Polhill v. Walter*, 3 Barn. & Adol. 114, thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill v. Walter*." In the same case, CRESSWELL, J., defines "fraud in law" in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens v. Heyworth*, 10 Mees. & W. 157, which was decided in the same year as *Crawshay v. Thompson*, 4 Man. & G. 357, Lord ABINGER having suggested that an action of fraud might be maintained where no moral blame was to be imputed, PARKE, B., said: "To support that count [viz., a count for fraudulent representation] it was essential to prove that the defendants, knowingly, [and I observe that

this word is emphasized,] by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series (*Taylor v. Ashton*, 11 Mees. & W. 401) is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable. PARKE, B., however, in delivering the opinion of the court, said: "It is insisted that even that, [viz., the gross negligence which the jury had found,] accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made."

* * * But then it was said that, in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now, it is impossible to conceive a more emphatic declaration than this: that, to support an action of deceit, fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Evans v. Collins*, 5 Q. B. 804, 820, they were reviewed by the exchequer chamber. The judgment of the court was delivered by TINDAL, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly, and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of the authorities, from *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, downwards, has laid down the general rule of law to be that fraud must con-

cur with the false statement in order to give a ground of action." Is it not clear that the court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true?"

In *Evans v. Edmonds*, 13 C. B. 777, MAULE, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." The foundation of this proposition manifestly is that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes, it to be true; and, if he has no such belief, he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement, made without reasonable ground for believing it, will support an action for deceit. In *Bank v. Addie*, L. R. 1 H. L. Sc. 145, 162, the lord president told the jury "that, if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be a misrepresentation and deceit." Exceptions having been taken to this direction without avail in the court of sessions, Lord CHELMSFORD, in this house, said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a *bona fide* belief in its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really

entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned lord intended to go further, as apparently he did, and to say that, though the belief was really entertained, yet, if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act; but he is not, in my opinion, "fraudulent" in the sense in which that word was used in all the cases from *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was willful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing. I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord CRANWORTH. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his lordship [the lord president] thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." Sir JAMES HANNEN, in his judgment below, seeks to limit the application of what Lord CRANWORTH says to cases where the statement made is a matter of opinion only. With all deference, I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank.

When this is borne in mind, and the words which follow those quoted by Sir JAMES HANNEN are looked at, it becomes to my mind obvious that Lord CRANWORTH did not use the words, "the opin-

ion which they had formed," as meaning anything different from "the belief which they entertained." The opinions expressed by Lord CAIRNS in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think that they bear any such construction. In the case of *Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious, when making the assertion, that they were ignorant whether it was true or untrue; for, if not, it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently. He must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord CAIRNS in the sense I have indicated, it is no more than an adoption of the opinion expressed by MAULE, J., in *Evans v. Edmonds*, 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord CAIRNS speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure. In *Peck v. Gurney*, L. R. 6 H. L. 377, 409, the same learned lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon a criminal charge, and that there was a great deal to show that they were laboring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a willful design or motive to mislead or defraud the public. But, in a civil proceeding of this kind, all that your lordships have to examine is the question, was there or was there not misrepresentation in point of fact? If there was however, however innocent the motive may have been, your lordships will be obliged to arrive at the consequences which properly would result from what was done." In the case then under consideration it was clear that, if there had been a false statement of fact, it had been knowingly made. Lord CAIRNS certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial; that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in *Foster v. Charles*, 7 Bing. 105, *Polhill v. Walter*, 3 Barn. & Adol. 114, and other cases I have already referred to.

I come now to very recent cases. In *Weir v. Bell*, 3 Exch. Div. 238, Lord BRAMWELL vigorously criticised the expression

"legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times, at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case COTTON, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge, in *Arkwright v. Newbold*, 17 Ch. Div. 301, laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent; that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington v. Fitzmaurice*, 29 Ch. Div. 459. In this latter case BOWEN, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as "*secondly*, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith v. Chadwick*, 20 Ch. Div. 27, 44, 67. The late master of the rolls there said: "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir GEORGE JESSEL in *Smith v. Chadwick*, 20 Ch. Div. 27, 44, 67, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole, I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and *bona fide* statement on the part of the defendants, and by no means exposes them to an action for deceit." I may further note that in the same case LINDBLEY, L. J., said: "The plaintiff has to prove—*First*, that the misrepresentation was made to him; *secondly*, he must prove

that it was false; *thirdly*, that it was false to the knowledge of the defendants, or, at all events, that they did not believe the truth of it." This appears to be a different statement of the law from that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith v. Chadwick* was carried to your lordships' house. L. R. 9 App. Cas. 187, 190. Lord SELBORNE thus laid down the law: "I conceive that, in an action of deceit, it is the duty of the plaintiff to establish two things: *First*, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, *secondly*, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned lord regards the proof of actual fraud as essential. All the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord BLACKBURN indicated that, although he nearly agreed with the master of the rolls, the learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a willful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: *First*. In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. *Secondly*. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. *Thirdly*. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, down to *Bank v. Addie*, L. R. 1 H. L. Sc. 145, in 1867, when the first sugges-

tion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord CRANWORTH, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord CHELMSFORD's view until the case of *Weir v. Bell*, 3 Exch. Div. 238, where it seems to be involved in Lord Justice COTTON's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The *dictum* of the late master of the rolls that a false statement, made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. Indeed, COTTON, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor v. Ashton*, 11 Mees. & W. 401, appears to me to be in direct conflict with the *dictum* of Sir GEORGE JESSEL, and inconsistent with the view taken by the learned judges in the court below. I observe that Sir Frederick Pollock, in his able work on Torts, (page 243, note,) referring, I presume, to the *dicta* of COTTON, L. J., and Sir GEORGE JESSEL, M. R., says that the actual decision in *Taylor v. Ashton*, 11 Mees. & W. 401, is not consistent with the modern cases, on the duty of directors of companies. I think he is right. But, for the reasons I have given, I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord BLACKBURN in *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, a very different thing from knowledge, if I thought that

a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene, and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that, by the special act of parliament which the company had obtained, they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants, except Wilde, with the inclination to scrutinize their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion. I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanor of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear

grounds, and, after carefully considering the evidence, I see no reason to dissent from STIRLING, J.'s, conclusion. I shall therefore assume the truth of their testimony.

I agree with the court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but, to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your lordships must consider what were the circumstances. By the general tramways act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. 33 & 34 Vict. c. 78, § 34. In order, therefore, to enable the company to use steam-power, an act of parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the board of trade. It was therefore incorrect to say that the company had the right to use steam. They would only have that right if they obtained the consent of the board of trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the board of trade, obtained a special act empowering the use of steam. It might well be that the fact that the consent of the board of trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the general tramways act, and I believe in the railways act also, prohibiting the line being opened until it had been inspected by the board of trade, and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn, now, to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the bar, and a director of one of the London tramway companies. He states that he was aware that the consent of the board of trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the standing orders, the plans had been laid before the board of trade, with the statement that it was intended to use mechanical as well as horse power, and no objection having been raised by the board of trade, and the bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, there-

fore, that, practically and substantially, they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the board of trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations; but that, on any reasonable requirements being complied with, they could not refuse their consent. It never entered his thoughts that, after the board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of section 35 of the act, inasmuch as he understood that the consent was obtained. He so understood from the statement made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the board of trade, because, as they had got the act of parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that, though he was aware that under the act the consent of the board of trade was necessary, he thought that, the company having obtained their act, the board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, STIRLING, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the board of trade would follow as a matter of course, because they had obtained their act. It was absolutely in the discretion of the board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed

that the consent of the board of trade was practically concluded by the passing of the act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. It is not unworthy of note that, in his report to the board of trade, Gen. Hutchinson, who was obviously aware of the provisions of the special act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The act of 1882 gives the company authority to use mechanical power over all their system." I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form,—by asking ourselves whether a reasonable man would be likely, under the circumstances, so to believe. I have applied this test. With that I have a strong conviction that a reasonable man, situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the presentation made was substantially true. Adopting the language of *JESSEL, M. R.*, in *Smith v. Chadwick*, 20 Ch. Div. 67, I conclude by saying that, on the whole, I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest, and *bona fide* statement on the part of the defendants, and by no means exposes them to an action for deceit." I think the judgment of the court of appeal should be reversed.

Order of the court of appeal reversed; order of STIRLING, J., restored; the respondent to pay to the appellants their costs below and in this house; cause remitted to the chancery division.

(See, also, *Angus v. Clifford*, [1891.] 2 Ch. Div. 449; *Salisbury v. Howe*, 87 N. Y. 128; *Meyer v. Amidon*, 45 N. Y. 169; *Allison v. Jack*, 76 Iowa, 205, 40 N. W. Rep. 811; *Cowley v. Smyth*, 46 N. J. Law, 380; *Caldwell v. Henry*, 76 Mo. 254; *Alexander v. Church*, 53 Conn. 561, 4 Atl. Rep. 103.)

2. Massachusetts rule.

(117 Mass. 195.)

LITCHFIELD v. HUTCHINSON.

(Supreme Judicial Court of Massachusetts.
Feb. 1, 1875.)

FRAUD—WHEN ACTION OF DECEIT LIES.

To sustain an action of deceit to recover damages, it is not always necessary to prove that the defendant knew that the facts stated by him were

false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true.

Exceptions from superior court, Middlesex county.

Action of tort brought by Paul F. Litchfield against Nathaniel Hutchinson for deceit in the sale of a horse. A verdict was returned for defendant. Plaintiff alleged exceptions.

D. S. Richardson, (G. F. Richardson, with him,) for plaintiff. W. S. Gardner, for defendant.

MORTON, J. This is an action of tort in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was, in fact, unsound and lame, all of which the defendant well knew. To sustain such an action, it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has no such knowledge. Page v. Bent, 2 Metc. (Mass.) 371; Stone v. Denny, 4 Metc. (Mass.) 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, Id. 503.

In the case at bar the plaintiff asked the court to instruct the jury "that if the de-

fendant made a representation of the soundness of the horse, as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustained damage, then the defendant is liable." We are of opinion that this instruction should have been given in substance. If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge; and a representation by the defendant, made as of his knowledge, that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him. A false representation of this character is sufficiently set forth in the declaration to constitute a cause of action, without the further allegation that the defendant well knew the representations to be false. It is not necessary that all the allegations should be proved if enough are proved to make out a cause of action. The instructions given upon the subject embraced in this prayer required the plaintiff to prove, not only that the defendant made the false representations alleged, as of his own knowledge, but also that the defendant knew that they were false, or that he did not honestly believe them to be true. In this respect the instructions were erroneous.

Exceptions sustained.

(See, also, *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. Rep. 168; *Davis v. Nuzum*, 72 Wis. 439, 40 N. W. Rep. 497; *Iron-Works v. Barber*, 106 Pa. St. 125; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. Rep. 139; *Bullitt v. Farrar*, 43 Minn. 8, 43 N. W. Rep. 556; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. Rep. 638; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360.)

II. FRAUD BY SILENCE.

(94 Mo. 423, 7 S. W. Rep. 421.)

GRIGSBY v. STAPLETON.

(*Supreme Court of Missouri*. March 5, 1888.)

SALE—FRAUDULENT CONCEALMENT OF LATENT DEFECT—CAVEAT EMPTOR.

Plaintiff sold cattle to defendant at a sound price, knowing that they had Texas fever, and that some of them had died from the disease. Defendant did not know that they were diseased, nor that any had died. Texas fever is a disease not easily detected, except by those acquainted with it. *Held*, a fraudulent concealment by plaintiff of a latent defect, and that the doctrine of *caveat emptor* did not apply.

Appeal from circuit court, Nodaway county; H. S. KELLEY, Judge.

Suit by Francis J. Grigsby against James Stapleton. Judgment for plaintiff, and, after motion for a new trial, defendant appeals.

Johnston & Craig, for appellant. *W. W. Ramsey and Edwards & Ellison*, for respondent.

BLACK, J. This was a suit in two counts. The first declares for the contract

price of 100 head of cattle sold by the plaintiff to the defendant; the second seeks to recover the value of the same cattle. The contract price, as well as the value, is alleged to have been \$3,431.25. The answer is—*First*, a general denial; *second*, fraudulent representation as to the health and condition of the cattle; *third*, fraudulent concealment of the fact that they had the Spanish or Texas fever; *fourth*, tender of their value in their diseased condition. Plaintiff purchased 105 head of cattle at the stock-yards in Kansas City on Friday, the 25th July, 1884, at \$3.60 per cwt. He shipped them to Barnard on Saturday. Mr. Ray, plaintiff's agent, attended to the shipment, and accompanied the cattle. Ray says it was reported in the yards, before he left Kansas City, that the cattle were sick with Texas fever; some persons said they were sick, and some said they were not. When the cattle arrived at Barnard, Ray told the plaintiff of the report, and that the cattle were in bad condition; that one died in the yards at Kansas City, before loading, and another died in the

cars on the way. On Sunday morning the plaintiff started with them to his home. After driving them a mile or so, he says he concluded to and did drive them back to the yards, because they were wild. One of them died on this drive, and two more died in the pen at Barnard before the sale to defendant. There is much evidence tending to show that plaintiff drove the cattle back, because he was afraid to take them to his neighborhood, and that he knew they were diseased, and dying from the fever. He made no disclosure of the fact that the cattle were sick to defendant, nor that they were reported to have the fever. Defendant bargained for the cattle on Sunday afternoon, and on Monday morning completed the contract at \$3.75 per cwt., and at once shipped them to Chicago. Thirty died on the way; twenty were condemned by the health officer. It is shown beyond all question that they all had the Texas fever. The court, by the first instruction given at the request of the plaintiff, told the jury that if "plaintiff made no representations to defendant as to the health or condition of said cattle to influence defendant to believe said cattle were sound or in healthy condition, but, on the contrary, defendant bought said cattle on actual view of the same, and relying on his own judgment as to their health and condition, then the jury will find for plaintiff; * * * and, if the cattle were bought by the defendant in the manner above stated, it makes no difference whether said cattle, or any of them, were, at the time of said sale, affected with Texas fever or other disease, or whether plaintiff did or did not know of their being so diseased, as, under such circumstances, he would buy at his own risk and peril."

Caveat emptor is the general rule of the common law. If defects in the property sold are patent, and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be that a concealment or misrepresentation as to extrinsic facts which affect the market value of the things sold, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. Cont. (6th Ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purpose for which it was sold, is a deceit; and, as a general rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. Cont. § 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud, when the fact of the disease is not disclosed. Cooley, Torts, 481. Kerr says: "Defects, however, which are latent, or circumstances materially affecting the subject-matter of a sale, of which the purchaser has no means, or at least has no equal means, of knowledge, must, if known

to the seller, be disclosed." Kerr, Fraud & M. (Ed. by Bump,) 101. In *Cardwell v. McClelland*, 3 Sneed, 150, the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying, "If the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it." In *Jeffrey v. Bigelow*, 13 Wend. 518, the defendants, through their agent, sold a flock of sheep to the plaintiff. Soon after the sale a disease known as the "scab" made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser; and the defendants were held liable for the deceit. In the case of *McAdams v. Cates*, 24 Mo. 223, the plaintiff made an exchange or swap for a filly, unsound from loss of her teeth. The court, after a careful review of the authorities as they then stood, announced this conclusion: "If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment, and must answer for it accordingly." This case was followed, and the principle reasserted, in *Barron v. Alexander*, 27 Mo. 530. *Hill v. Balls*, 2 Hurl. & N. 299, seems to teach a different doctrine; but the cases in this court, supported as they are, must be taken as the established law of this state.

There is no claim in this case that defendant knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattle-men to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge. To withhold these circumstances was a deceit, in

the absence of proof that defendant possessed such information. It follows that the first instruction is radically wrong, and that the second, given at the request of the plaintiff, is equally vicious. The

judgment is reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

(The following cases are to the same effect: *Maynard v. Maynard*, 49 Vt. 297; *French v. Vining*, 102 Mass. 132; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. Rep. 407; *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. Rep. 552; *Stewart v. Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. Rep. 101. But some cases are to the contrary: *Paul v. Hadley*, 23 Barb. 521; *Beninger v. Corwin*, 24 N. J. Law, 257. See *Hadley v. Clinton*, etc., Co., 13 Ohio St. 502.)

III. FALSE STATEMENTS AS TO MATTERS OF OPINION.

(102 N. Y. 454, 7 N. E. Rep. 321.)

HICKEY V. MORRELL.

(*Court of Appeals of New York*. June 1, 1886.)

WAREHOUSEMAN — FALSE REPRESENTATIONS THAT WAREHOUSE WAS FIRE-PROOF.

A warehouseman, in a circular soliciting patrons, stated that in his warehouse no expense had been spared in supplying "protection against the spread of fire, the exterior being fire-proof," etc. Portions of the exterior of the building were in fact constructed of wood. *Held*, that such statement was the statement of a matter of fact, not the mere expression of an opinion; and, if made by the warehouseman with knowledge of the component parts of his building, and with intent to deceive, a person who was induced thereby to deliver, for storage in the warehouse, property which was destroyed by fire communicated to such wooden portions of the structure, was entitled to recover from the warehouseman for the loss so incurred. *EARL, J.*, dissenting. 12 Daly, 482, reversed.

Appeal from court of common pleas of the city and county of New York, general term.

Action by Teresa H. Hickey against John H. Morrell for alleged false representations by defendant. The complaint was dismissed at the trial, and the judgment for defendant entered thereon was affirmed by the general term on appeal. 12 Daly, 482. From the judgment of the general term plaintiff again appealed.

Matthew Hale, for appellant. *John M. Bowers*, for respondent.

DANFORTH, J. As to the character of this action the parties are agreed. It is for "falsely and fraudulently," and "with an intent to deceive and defraud the plaintiff," representing, among other things, that the defendant's warehouse was "fire-proof on the exterior," whereby the plaintiff was induced to deliver to him, to be stored therein, certain property of value, which, while there, was destroyed by fire communicated from the outside "to the wooden cornice and wooden window-frames" of the warehouse, and thence to the property in question. The answer admitted that defendant was proprietor of the warehouse; that it and the articles described in the complaint were destroyed by fire; but denied the other matters above referred to as making out a cause of action, and set up that "the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner's risk of fire."

There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff, and in

view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws 1871, c. 742, § 8) "in relation to storage, and other purposes," imposing liabilities upon persons for any fire resulting from their willful and culpable negligence, and which, among other things, requires "the closing of iron shutters" at the completion of the business of each day, by the occupant of the building having use or control of the same; but the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute, also referred to, relating to buildings in the city of New York, (Laws 1874, c. 547, § 5,) is of some importance in its bearing upon the point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors and blinds and shutters made of fire-proof metal on every window and opening above the first story.

The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which, as therein stated, was to call "the special attention of persons having valuable articles, merchandise, or other property for storage to his new first-class storage warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation, and protection against the spread of fire; the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors, and railings, appropriate and convenient in every way for the various kinds of articles to be stored."

The learned counsel for the respondent argues that the only statements of fact in the paragraph quoted are those which relate to the interior as divided by heavy brick walls, iron doors, and railings; that as to those the defendant had knowledge; and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which, if stated, would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents if they happened to be of the same character.

We think the appellant's ground of com-

plaint a just one. It was proven that in fact the window-frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood, covered with tin. The fire occurred in the evening. It originated in other buildings across the street, and from them communicated to the wooden window-frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed, as was the one in question, "with wooden window-frames and sashes, and no outside shutters," could not be deemed fire-proof, and that in October, 1881, it was practicable to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited, upon the ground that the statement in the circular, as to the character of the exterior of the building, was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the general term. In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered must be expected and allowed for; but, when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whomsoever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof suggests a comparison between that portion and other parts of the building not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion. No one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz., "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view and guarded against; and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors, and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired ob-

ject, and the statement of the material used is in connection with the representation as to the quality of the exterior. No one reading of inside walls and railings of incombustible material, and of an exterior fire-proof, could suppose that a precaution against fire made necessary by statute had been omitted, or that a builder who called attention to such matters as an inducement to patronage could have regarded wooden window-frames as in any sense fire-proof. The language of the circular is very emphatic. In effect, it says the buildings, as a whole, have been erected at an immense cost; from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials, and skill in construction, affording security, at least, against all the ordinary dangers to which property might be exposed when put in store. But this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire;" and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior. That is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings;" describing, at the same time, its arrangement, and the substance of its walls and partitions.

As to this, therefore, the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings, and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might, indeed, be impaired by the necessary openings for doors and windows, but for the purpose of preventing mischief by fire, or, as the defendant put it, "the spread of the fire," the exterior is pronounced fire-proof. Had he only said of the exterior, as he did of the interior, "the wall is of brick," the intending customer would have been put to an inquiry as to the window-frames and doors. He said much more. We think, therefore, that the defendant must be regarded as stating a fact, and not as expressing a mere opinion, when he described the exterior, that is, the whole exterior, of his buildings as fire-proof. Such statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished; to an existing fact, as distinguished from one yet to come into existence. It was made after calling to mind the use to which the buildings were to be put, the fact that the attention of the builder had been especially directed to "protection against the spread of fire," which could be effected only by the use of proper materials; and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent,—*Walker v. Milner*, 4 Fost. & F. 745. There the action was upon a war-

ranty that "the safe in question was thief-proof;" "that nothing can break into it." It was broken into. There was no suggestion of fraud or deceit, and the jury were required to discriminate between what was represented and what was warranted, and, unless satisfied there was a warranty, to find for the defendant. The safe-maker's prospectus was put in evidence. It stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus, in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty. But COCKBURN, J., observed that, "assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty; for, after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description." In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building partly of wood, although to no greater extent than the one in question, was not fire-proof, within the meaning and intent of the circular. They might also find that when the circular was issued this fact was known to the defendant; and then the doctrine suggested by COCKBURN, J., in the case cited, would have some application.

Nor do the other cases referred to seem to support respondent's contention. They exclude the idea of fraud, and relate to matters of mere opinion; as whether a certain valve will consume smoke and save fuel, (*Prideaux v. Bunnett*, 1 C. E., N. S., 613;) whether certain pictures were the work of the old masters, or copies, (*Jendwine v. Slade*, 2 Esp. 572;) whether land was of the value certified to, (*Gordon v. Butler*, 105 U. S. 553.) But in none of them is it denied that, if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie. It is certainly well settled upon principles of natural justice that for every fraud or deceit which results in consequential damage to a party he may have an action.

Here the complaint states, not only a false representation, with a fraudulent intent, but that the falsehood was conscious and willful; that by it the plaintiff was induced to deliver her property to be stored in the building, and thereby incurred loss. The evidence may be so viewed as to sustain these allegations. The learned counsel for the respondent has stated, in the broadest and most unqualified terms,

as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from anything else; and, where the proposition is found in the books, it is so restricted. Thus it is said: "Matters of opinion, stated merely as such, will not, in general, form the ground to a legal charge of fraud." *Leake*, Cont. 355, giving many instances and also exceptions to the rule. Statements of value have been held insufficient to sustain an action where, as is said, they were "mere matters of opinion," (*Simar v. Canaday*, 53 N. Y. 306;) but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then, if false, an action can be maintained upon them. The same rule applies where, A. desiring credit of B. for a certain amount, the latter asks C. as to the solvency of A., and he replies, "He is good; as good as any man in the country for that sum." No doubt this involves opinion; but it is held that if the recommendation was made in bad faith, and with knowledge that A. was insolvent, C. would be liable. *Upton v. Vail*, 6 Johns. 181. And so as to every representation concerning a matter of fact, by which one man is induced to change his position, to his injury, or the benefit of another, it may be so expressed as to bind the person making it to its truth, whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant, there are many words of commendation, which, however strong, could not be relied upon as the basis of contract. The ones at first referred to are not of that character. They relate to the present, and describe a portion of the building in its existing state as "being fire-proof." This is not a matter of opinion, for it defines a state or condition, and, if part of that portion was of wood, may properly be regarded as "a false statement of a fact." Whether the defendant knew the component parts of his own buildings, and, if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions, for it seems to us they are, as the case stands, properly for the jury; and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried, the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and MILLER, J.J., not voting, and EARL, J., dissenting. Judgment reversed.

(See, also, *Chrysler v. Canaday*, 90 N. Y. 272; *Marsh v. Falker*, 40 N. Y. 562; *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. Rep. 881; *Gordon v. Butler*, 105 U. S. 553; *Holbrook v. Connor*, 60 Me. 578; *Cowley v. Smyth*, 46 N. J. Law, 380; *Cooper v. Lovering*, 106 Mass. 77.)

IV. FALSE STATEMENTS AS TO PATENT OR OBVIOUS DEFECTS.

(68 N. Y. 426.)

LONG V. WARREN.

(Court of Appeals of New York. Feb. 13, 1877.)

1. FRAUD — FALSE REPRESENTATIONS BY VENDOR AS TO OBVIOUS FACTS.

When the real quality of property sold is obvious to ordinary intelligence, and the vendor and vendee have equal knowledge or equal means of acquiring information, and the truth or falsity of representations made by the vendor as to its quality may be ascertained by the vendee by the exercise of ordinary inquiry or diligence, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, which every prudent person ought to make, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.

2. SAME.

In an action for false representations by defendant, whereby plaintiff was induced to purchase defendant's farm, it appeared that defendant represented to plaintiff that there was no quack grass on the farm, save in a small two-acre lot, and that plaintiff, relying thereon, purchased the farm. It also appeared that, before purchasing, the plaintiff walked over portions of the farm with his brother-in-law, both of whom were farmers, which portions contained quack grass in large quantities, and this could have been easily perceived on passing over them. *Held*, that plaintiff had equal means of knowing of the existence of the quack grass, and could not recover for the false representations of defendant.

Appeal from supreme court, general term, fourth department.

Action by Edward Long against Oscar F. Warren to recover damages alleged to have been sustained by plaintiff by false representations of defendant in the sale of a farm. The case was submitted to a referee, who reported for plaintiff. The judgment entered on such report was reversed by the general term. From the judgment of the general term plaintiff appealed.

M. H. Peck, for appellant. *H. E. Sickels*, for respondent.

FOLGER, J. This is an action at law to recover damages for false representations and deceit in the sale of a farm by the defendant to the plaintiff. The representations alleged to be false were as to the non-existence on the farm of a noxious weed or grass known as "quack grass." It is alleged that the plaintiff asked the defendant if there was any quack; and the defendant referred to a little piece north of the garden and the barn, about one and one-half or one and three-fourths acres, and said that there was quack there, and that he dug it out. The plaintiff then asked him if there was any other quack, and he said, "No," there was none on the farm except one little piece, and that the boys had raked all out. This is the testimony of the plaintiff, and tends to prove a representation that there was but one piece of quack grass on the farm, in extent not more than one and three-quarters acres. The defendant's testimony is that in passing over the farm the plaintiff and he went to what he called the "quack lot,"

next the road, above the barn; that as they went into that lot the plaintiff said: "This devilish stuff is all over the farm, ain't it?" The defendant told him: "No, it was not; that I did not know of but two other patches, where I had cultivated land; there might be quack in some of the fields I had not plowed, but I had not discovered any. I told him one was by the sand-bank, and the other in next lot west." There is quite a difference in the version of the statements made on that occasion, as given by the plaintiff or the defendant. There was but one other person present, one Kinney, who was a witness at the trial. He says that "the subject of quack grass was mentioned. Plaintiff asked defendant something about quack grass, and defendant said there was some on corner lot north and east of farm, an acre and a half, and that he had had his boys raking it out and burning it. I had seen stuff burning; said they had been burning it and thought that they had got it out. I have no distinct recollection of anything else."

I can but conclude that, on the difference between the plaintiff and defendant as to what was said by the defendant on the subject of the quack grass, the plaintiff is corroborated to a considerable extent by Kinney, and that the preponderance of the testimony is that the defendant represented that there was but one piece, not in size two acres, and that that had been probably got out. This, then, was the substance of the representation made. The proof is ample to show that it was false. Without recapitulating the testimony, it suffices to say that it establishes that there were many places on which the weed was growing; that the extent of it was twenty-five acres, or near thereto; and that it was in vigorous and luxuriant condition.

With this proof of the extent of land affected by it, and the vigor of the growth of it, and that it was upon tilled as well as meadow and pasture land, and some proof of the defendant's knowledge of the presence of it in lots other than that named by him, it is impossible to conclude that the defendant did not know of the existence of it on the farm in more places and to greater extent than he described to the plaintiff, and that he is chargeable with a *scienter* of the falsity of his representation. With the facts proven that the plaintiff made particular inquiry of the defendant as to it; that the extent and growth of it was so much larger than the defendant told the plaintiff; and with the fact, hereafter to be noticed, that it was a drawback from the value of the farm, both for cultivation and for sale,—it is not possible to infer that the defendant did not intend to have the plaintiff believe the statement made to him, or that he did not intend to deceive the plaintiff to his harm, and that the representation made is not shown to be a false and fraudulent one.

It is established by the testimony of the plaintiff that he relied upon the state-

ment, and was induced by it to make the purchase of the farm. Scarcely a witness is sworn who does not testify that the presence of quack grass in the soil of a farm, to the extent and strength of growth shown by the testimony, was a damage to the farm either for tillage or for the market. We have, then, the union of fraud and damage thereby, which are valid to give cause of action. Bayly v. Merrel, Cro. Jac. 386.

There is another question yet to be determined before we can say that the plaintiff may recover. It does not appear that the defendant used any artifice, either of word or act, to dissuade or turn away or hinder the plaintiff from making inspection of the farm for himself, so as to ascertain by his own faculties, and those of his companion, Kinney, whether, in fact, there was more of the quack grass upon the premises than the defendant had stated. It is evident that he had the opportunity in full degree to make a personal examination. He was advised by the defendant's declaration, and by his own view of it, that there was one piece of it on the farm, and thus made aware of the possibility of it being in the whole soil. He had twice passed across the farm in company with Kinney. He had heard and read of this grass; indeed, his inquiry as to it of the defendant shows that he was alive to the evil of it. He had encountered it before in his own garden, and had seen it before on Sturtevant's farm, more than once, as he passed over it. He had been a farmer all his life, and knew what quack grass was. Kinney, who was with him, and is his brother-in-law, had known quack grass for the 10 years before the trial; had seen it elsewhere, on other land, at the time they passed over the farm; and had had it on his own farm, his business being that of a farmer, and had got a good deal out by raking and burning. They went into the orchard on their first visit to the farm. They went across the wheat-field then; and on the second visit, they went across the meadow by the barn. The testimony shows that on each of those fields this grass was rooted and growing, on some of them very thrivingly, so that the plaintiff, and his friend who was with him, not only had unrestrained opportunity to go into every field on the farm, and use their faculties in the detection of any noxious plants growing in the soil, but they did, in fact, go into three of the fields in which the testimony shows that it was growing, and where it must have been under their feet. Was there any reason in the nature of things, the season of the year, the structure and appearance of the plant, which would prevent a person looking for it from discovering it? It was in the latter part of the year that they were there, and there had been a frost, but the strength of the testimony is that there was no snow to cover the ground. The testimony is not entirely unanimous as to the ease of distinguishing it from other grasses; but the great preponderance is that it may be quite readily distinguished from wheat blades, or from blades of timothy grass, the two plants which it

most resembles. It can be told on plowed land, or in growing wheat. It can be seen in a field by one riding along the road. It is plain to be seen; a heavy freeze changes it, but a frost darkens its color, and makes it the more conspicuous. When eaten down close by animals, it is not easily discernible, and some of the pieces where the quack was had been pastured close. But the strength of the testimony is that it is readily perceived by one who is well acquainted with it, among other grasses, or in growing wheat, or on plowed land, and will be noticed by a common observer as he passes through it, or by a man of ordinary prudence, who is about buying a farm.

One is forced by the testimony to the conclusion that had the plaintiff, when he was on the farm before the purchase, taken ordinary pains to look out for this grass, he would have perceived it in some other lots than that to which it was confined in the defendant's representation. Now, the rule of law in such case was early thus laid down. Where the matter is not peculiarly within the knowledge of the defendant, and the plaintiff has the means of obtaining correct information, apart from the statements made to him, he may not recover upon the false declaration. Bayly v. Merrel, *supra*. To the same effect is Starr v. Bennett, 5 Hill, 303. The representations must be such as that the vendee has no means of discovering their falsity. If he does not avail himself of the means of knowledge within his reach, he will not be entitled to the aid of a court of equity. Tallman v. Green, 3 Sandf. 437. It is stated in Smith v. Countryman, 30 N. Y. 681, though *obiter* perhaps, that statements as to the value of property, and the freedom of it from defects which are known, to the one making them, to exist, but which might, by the exercise of reasonable diligence, be discovered, do not, if false, vitiate the contract. In Vernon v. Keys, 12 East, 632, affirmed, 4 Taunt. 488, it is held that a seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing. And see 1 Kent, Comm. 484, 485; Sherwood v. Salmon, 5 Day, 439, 449. At *nisi prius* a limitation to the rule was announced, as follows: Means unused, of detecting the falsity of representations, are not a bar to an action, but matter for the jury, and, if the jury find for the plaintiff, will not be ground for a reversal. Bowering v. Stevens, 2 Car. & P. 337. But we are not now reviewing the verdict of a jury for the plaintiff, but are dealing with the facts, as a general proposition, as if we sat in the place of a jury, and are not called upon to sanction or disapprove that holding at *nisi prius*. It is also said in one case, that the very fact of a warranty having been given would tend to throw the warrantee off his guard, and prevent him from making a close examination. Holyday v. Morgan, 28 Law J. Q. B. 9. But that is where he has taken a covenant, and may rely upon it.

In the kindred cases of false pretenses,

the criminal law holds to the rule we have above given, and it has been resolved that, where an exercise of common prudence and caution on the part of the prosecutor would have enabled him to avoid being imposed upon by the pretenses alleged, there can be no conviction. *People v. Williams*, 4 Hill, 9. The rule is summed up in *Addison on Torts*. When the real quality of the thing spoken of is an object obvious to ordinary intelligence, and the parties making and receiving the representations have equal knowledge, or equal means of acquiring information, and the truth or falsity of them may be ascertained by the party interested in knowing, by the exercise of ordinary inquiry and diligence, and they are not made for the purpose of throwing him off his guard, and diverting him from making inquiry and examination, which every prudent person ought to make, there is no warranty of the truth of the representations, or that they are as they are stated to be, and there are no "false and fraudulent warranties," within the legal definition of that phrase, upon which an action can be maintained.

The rule is comprehensively stated as follows, by the United States supreme court in *Slaughter's Adm'r v. Gerson*, 13 Wall. 383: "They must be representations relating to a matter as to which the complaining party did not have at hand the means of knowledge. Where means of knowledge are at hand, and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations." See, also, *Davis v. Sims*, Lalor, Supp. 234; *Rubber Co. v. Adams*, 23 Pick. 256; *Mooney v. Miller*, 102 Mass. 220. Some of the cases cited were of sales of land.

The testimony in this case, to which we have recurrd as above stated, brings the

plaintiff within the force of the rules we have above set forth. This quack grass was an object obvious to the intelligence of the plaintiff. He had equal means with the defendant of acquiring information, within the meaning of the rule; for it did not require weeks or days upon the farm, or actual tillage of it, but only the exercise of the faculty of sight while passing over the farm. The truth or falsity of the representations could, by the exercise of ordinary diligence in examination, have been made known. The inquiry and examination was one which a prudent person ought to have made, with the means and opportunity so ready.

The learned counsel for the appellant makes the claim, in his printed points, that the plaintiff and his friend Kinney did exercise all the care and precaution of an ordinarily prudent man. The testimony does not sustain this. There is no proof that they examined or looked with a view to discover the quack if it was there. They testify that they did not discover it; not that they tried to. They did not go over the farm thoroughly, and with a view to find it there, if it was there growing; nor on the lots which they entered upon was their attention upon this matter and an inspection kept up, which, as we have seen, would have necessarily discovered it. The proof of its existence on the farm, in excess of the defendant's statement, shows it is so luxuriant in growth, so close in its connection stalk to stalk, and so conspicuous to observers having no interest in the question of its presence or absence, as that it is beyond belief that an attempt to find it, made before the purchase, would not have disclosed it. Hence the order of the general term should be affirmed, and judgment absolute given for the defendant.

CHURCH, C. J., and ALLEN and MILLER, J.J., concur. RAPALLO, ANDREWS, and EARL, J.J., dissent.

Order affirmed, and judgment accordingly.

(See, also, *Leavitt v. Fletcher*, 60 N. H. 182; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. Rep. 243; *Brown v. Leach*, 107 Mass. 364; *Rubber Co. v. Adams*, 23 Pick. 256.)

CONFLICT OF LAWS IN REGARD TO TORTS.

(84 N. Y. 48.)

LEONARD v. COLUMBIA STEAM NAV. CO.

(*Court of Appeals of New York*. Feb. 8, 1881.)

1. CONFLICT OF LAWS — ACTION GIVEN BY STATUTE—LEX FORI.

Where the statutes of one state give to the executor or administrator of a deceased person a right of action to recover damages for his death, caused by negligence, such an action may be maintained in the courts of another state having a substantially similar law, on proof of the law of the former state. In such case the action is on the same footing as to its transitory nature as an action of tort at common law.

2. EXECUTORS AND ADMINISTRATORS—ACTIONS BY.

Letters of administration granted by a surrogate are conclusive as to the authority of the administrator therein named to bring an action given by law to the personal representatives of one deceased, in an action by him under such a law.

3. JUDGMENT—CORRECTION.

Where interest, not given by the verdict, is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment, and not by appeal.

Appeal from supreme court, general term, first department.

Action by Joseph Leonard, as administrator, etc., against the Columbia Steam Navigation Company, to recover damages for the death of plaintiff's intestate caused by alleged negligence of defendant. Verdict and judgment for plaintiff. The judgment was affirmed by the general term on appeal. Defendant again appealed.

Dennis McMahon, for appellant. *Christopher Fine*, for respondent.

MILLER, J. The intestate was killed by reason of the explosion of a boiler of a steamer within the boundaries of the state of Connecticut, which the jury found was occasioned by the negligence of the defendant, who was the owner thereof. The statutes of that state created a cause of action in favor of and for the benefit of the next of kin and heirs at law in certain cases which are enumerated. By the Revision (Ed. 1875,) § 3, p. 488, a right of action is given to the representatives of a person killed by the negligence of any railroad company or its servants, to recover damages to the amount of \$5,000. The common-law rule as to actions for injuries to the person is changed, and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason of death, and that the executor or administrator may prosecute the same, and that all actions for injuries to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. St. Conn. (Revision 1875,) c. 6, tit. 19, §§ 8, 9. It is held that, under these provisions of the statutes of Connecticut, an action lies in that state in favor of the representatives of a deceased party to recover damages. *Murphy v. Railroad Co.*, 30 Conn. 184, 29 Conn. 496; *Soule v. Railroad Co.*, 24 Conn. 575. The construction thus placed by the courts of another state upon the statutes of that state should be followed, and is controlling in the tribunals of such state. *Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 N. Y. 218.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory, (Bouv. Law Dict. "Personal Actions," "Transitory Actions;") and these actions may be brought anywhere, and are governed by the *lex fori*, (Bouv. Law Dict.; Story, Conf. Laws, § 307, a, e.) The cause of action which the statutes of Connecticut created is transitory in its nature, and, unless excepted from the general rule as to the place where such action may be brought, can be enforced in the courts of this state or any other forum, provided the laws of that forum do not forbid its maintenance. In this state it is held that actions will lie for injuries to the person committed outside of the territorial limits of the state. In *Smith v. Bull*, 17 Wend. 323, it was decided that an action for an assault and battery committed in the state of Pennsylvania could be maintained in any court of common pleas of this state. The rule, no doubt, is that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which

they originated. In contemplation of law, the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state, but in a foreign country, unless it is proved that the laws of that country are of a similar character. *Whitford v. Railroad Co.*, 23 N. Y. 465; *Beach v. Steam-Boat Co.*, 30 Barb. 433; *Crowley v. Railroad Co.*, Id. 99; *McDonald v. Mallory*, 77 N. Y. 547.

These decisions rest upon the principle that the statutes of this state can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other states or countries are similar to our laws. In *Whitford v. Railroad Co.*, supra, the injury was done in New Grenada. After considering the effect of the statute in a foreign country, DENIO, J., remarks: "Whatever liability the defendants incurred by the laws of New Grenada by the act mentioned in the complaint might well be enforced in the courts of this state, * * * but the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them." The doctrine of this case is approved in *McDonald v. Mallory*, supra, and it is laid down by RAPALLO, J., that, where the wrong is committed in a foreign state or country, no action "can be maintained here without the proof of existence of a similar statute in the place where the wrong was committed." The rule here laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the state where the action is given by law or where it is brought, but merely requires that it should be of a similar import and character. The statute in this state is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle, and possesses the same general attributes, as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact, when there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both states relating to the subject prevailed.

The doctrine that an action will lie when

the common law or the statutes of different states or countries correspond, is sustained by numerous authorities. *Madrazo v. Willes*, 3 Barn. & Ald. 353; *Melan v. Duke de Fitzjames*, 1 Bos. & P. 138; *Mos-tyn v. Fabrigas*, Cowp. 161; 1 Smith, Lead. Cas. 963; *Shipp v. McCraw*, 3 Murph. 463; *Wall v. Hoskins*, 5 Ired. 177; *Stout v. Wood*, 1 Blackf. 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death napping in the state of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other state courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. Railroad Co.*, 98 Mass. 85, the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different states were not of a similar nature, and the common-law rule prevailed in Massachusetts. The case, therefore, is not analogous. In *Woodard v. Railroad Co.*, 10 Ohio St. 121, it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representative of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under the statute of Illinois, or whether an administrator appointed under the laws of Illinois might not maintain such action. The question now presented is not fully considered, and therefore the decision has no force as a case in point. In *Needham v. Railway Co.*, 38 Vt. 295, the death occurred in the state of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In *State v. Railroad Co.*, 45 Md. 41, there was no allegation that there was any statute in the state where the death was caused creating a cause of action, and it was held that, in the absence of any proof, there was no presumption in favor of a positive statute law of the state, but it must be presumed that the common law prevailed. The

case, therefore, is not in point. In *Railroad Co. v. Lacy*, 43 Ga. 461, the same general state of facts existed and the same rule was recognized. *Marcy v. Marcy*, 32 Conn. 308, does not directly affect the point considered.

From this review of the cases it is manifest that the authorities cited do not sustain the position that this action cannot be maintained in this state under the circumstances existing, and we are of the opinion that the right of the administrator to bring the same is clear and beyond question. The letters of administration granted by the surrogate are conclusive as to his authority. *Roderigas v. Institution*, 63 N. Y. 460; *Kelly v. West*, 80 N. Y. 139. The letters on their face show that the intestate died "leaving assets" in the state and in the county of New York, and this gave the surrogate of the county of New York jurisdiction. 3 Rev. St. (6th Ed.) p. 76, § 24. Nor was it essential, we think, that letters should have first been taken out in the state of Connecticut. Be that as it may, however, the letters issued by the surrogate are conclusive as to the right of the administrator to maintain this action. In regard to the question as to the right to recover interest, there is no evidence that the interest was added to the verdict upon the trial. It does appear, however, to have been inserted in the judgment from the record before us. We may assume that it was added on the taxation of the costs, and the question can only be properly reached by a motion to retax costs or to correct the judgment at special term, and not by appeal. See Code Civil Proc. §§ 1346, 1349. Where a clause is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment, and not by appeal. *People v. Goff*, 52 N. Y. 434; *Kraushaar v. Meyer*, 72 N. Y. 602; *De Lavallette v. Wendt*, 75 N. Y. 579. There was no error in the refusal of the judge to charge any of the requests submitted to him by the defendant's counsel, and, after a careful examination, we are unable to discover that any error was committed by the judge in the various rulings as to the admissibility of evidence.

After full consideration, we think that the case was properly disposed of at the circuit, and that the judgment should be affirmed.

All concur, except RAPALLO, J., absent; FOLGER, C. J., concurring in result. Judgment affirmed.

(See, also, *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. Rep. 1050; *Le Forest v. Tolman*, 117 Mass. 109; *McLeod v. Railroad Co.*, 58 Vt. 727, 6 Atl. Rep. 643; *Niles v. Howe*, 57 Vt. 383; *Dennick v. Railroad Co.*, 103 U. S. 11; *Mannville Co. v. Worcester*, 138 Mass. 89; *Davis v. Railroad Co.*, 143 Mass. 301, 9 N. E. Rep. 815; *Edgerly v. Bush*, 81 N. Y. 199; *Knight v. Railroad Co.*, 108 Pa. St. 250; *Boyce v. Railroad Co.*, 63 Iowa, 70, 18 N. W. Rep. 673.)

INDEX.

ABANDONMENT.

Of civil action by the plaintiff, by neglect to proceed with it, is a final termination thereof, on which the defendant may maintain an action for malicious prosecution.—*Cardival v. Smith*, 102.

ABATEMENT AND REVIVAL OF ACTIONS.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir.—*Mobile Life Ins. Co. v. Brame*, 248.

ABATEMENT OF NUISANCES.

Entry on land of another to abate a nuisance thereon, without previous request or notice to the occupant to remove it, not justifiable in the case of a nuisance merely continued by such occupant as alienee of the premises, where he was not himself the wrong-doer by having created the nuisance or neglected to perform some obligation by the breach of which it was created.—*Jones v. Williams*, 189.

He who undertakes to abate a nuisance proceeds at his peril, taking the risk of being able to show that the thing complained of was in fact a nuisance; if he errs in judgment, he is answerable in damages; if a breach of the peace is involved, he is liable to indictment.—*Crosland v. Borough of Pottsville*, 190.

Where a person entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess; and if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits.—*Crosland v. Borough of Pottsville*, 190.

ABSCONDING DEBTORS.

Aiding debtor to abscond, and purchasing from him property subject to attachment, not a ground of action by a creditor having no lien or claim on the property.—*Lamb v. Stone*, 8.

ABUSE OF PROCESS.

Action maintainable for malicious abuse of process.—*Grainger v. Hill*, 107.

ACCIDENT.

No liability in tort for purely accidental injuries.—*Brown v. Kendall*, 51.

To exempt a defendant from liability on the ground that the injury to plaintiff was an inevitable accident, it must be such an accident as defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.—*Brown v. Kendall*, 53.

ACQUIESCENCE.

In nuisance, less than 20 years, not a bar to equitable relief, unless it amount to laches, or create an estoppel.—*Campbell v. Seaman*, 164.

ACTION.

Violation of legal right or legal duty necessary to sustain action of tort.—*Guest v. Reynolds*, 1; *Miller v. Woodhead*, 4; *Gramlich v. Wurst*, 5; *Rich v. New York Cent. & H. R. R. Co.*, 60.

Action cannot be maintained for damage caused by improvements made on one's own land, in the exercise of his legal rights therein, without violation of any legal right of the person damaged.—*Thurston v. Hancock*, 23; *Ocean Grove Camp-Meeting Ass'n v. Commissioners of Asbury Park*, 26; *Smith v. Thackerah*, 80.

No right of action for negligence unless there is a violation of legal duty.—*Larmore v. Crown Point Iron Co.*, 219.

Violation of merely moral right or duty not ground of action.—*Lamb v. Stone*, 8; *Derry v. Peek*, 256.

Action may be maintained for violation of legal rights created by statute.—*Willy v. Mulledy*, 16.

May be maintained for a breach of a duty imposed by statute upon any citizen, by one having a special interest in the performance thereof, to whom damage is caused by such breach.—*Willy v. Mulledy*, 16.

May be maintained for violation of right to vote.—*Webb v. Portland Manuf'g Co.*, 20; *Smith v. Thackerah*, 80.

May be maintained for fraud, coupled with damage.—*Upton v. Vail*, 31; *Hickey v. Morrell*, 262.

May be maintained for malicious prosecution of a civil proceeding; at least if there has been deprivation of liberty, or taking of property.—*Cardival v. Smith*, 102; *Pope v. Pollock*, 104; *Bump v. Betts*, 107.

May be maintained for an arrest which is a malicious abuse of process.—*Grainger v. Hill*, 107.

May be maintained for damages for a trespass without wrongful intent.—*Bessey v. Olliot*, 49; *Weaver v. Ward*, 49; *Guille v. Swan*, 49; *Hobart v. Hagget*, 195; *Dexter v. Cole*, 195; *Laverty v. Snaethen*, 197.

Injuria sine damno gives a right of action.—*Dixon v. Clow*, 18; *Webb v. Portland Manuf'g Co.*, 19.

Action cannot be maintained for act not itself unlawful, where no damage is sustained.—*Roberts v. Roberts*, 28; *Smith v. Thackerah*, 80; *Upton v. Vail*, 31.

Cannot be maintained for a nuisance causing injury to plaintiff, unless he shows some special damage to his person or property differing in kind from that sustained by other persons subjected to inconvenience and injury from the same cause.—*Wesson v. Washburn Iron Co.*, 184.

May be maintained for untrue statement disparaging goods of another, made without lawful occasion, and causing him special damage.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 11.

Cannot be maintained for acts of mere competition in business, carried on for the purpose of gain, and without actual malice, even though intended to drive a rival in trade away from his place of business, and though that intention be actually carried into effect.—*Van Horn v. Van Horn*, 110.

May be maintained for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages.—*Van Horn v. Van Horn*, 109.

Could not be maintained, at common law, for damages for an act causing the death of a human being, though clearly involving pecuniary loss.—*Mobile Life Ins. Co. v. Brame*, 247.

Cannot be maintained even for tort, where dam-

ages are too remote, contingent, or indefinite.—Lamb v. Stone, 9, 10; Clark v. Chambers, 32; Vandenberg v. Truax, 37; Lowery v. Manhattan Ry. Co., 38; Milwaukee & St. P. Ry. Co. v. Kellogg, 41; Moody v. Baker, 44; Bowen v. Hall, 46.

Cannot be maintained by insurance company against one who willfully fired a building which it had insured, whereby it was compelled to pay the loss.—Mobile Life Ins. Co. v. Brame, 248.

Cannot be maintained against a witness for giving false testimony in a suit by which another is injured.—Rice v. Coolidge, 13; Mobile Life Ins. Co. v. Brame, 248.

May be maintained against one who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party.—Rice v. Coolidge, 13.

May be maintained for loss of a marriage by plaintiff in consequence of words spoken of plaintiff by defendant, although such words are not in themselves actionable, and although plaintiff has a remedy for breach of the contract of marriage.—Moody v. Baker, 44.

Cannot be maintained by contractor for support of town paupers against a person inflicting personal injury upon such a pauper, on the ground that thereby the contractor was subjected to extra expenditure.—Mobile Life Ins. Co. v. Brame, 248.

May be maintained against one who entices away a servant while under contract of employment with plaintiff for a certain term under a specified penalty, notwithstanding plaintiff has a remedy on such contract against the servant.—Moody v. Baker, 45.

Cannot be maintained by one party to a contract against a third person for persuading the other party to the contract not to perform it.—Mobile Life Ins. Co. v. Brame, 248.

It seems that one who procures another to break a contract by the latter with a third party is responsible for the breach only where malice to such third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—Van Horn v. Van Horn, 110.

Wherever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.—Bowen v. Hall, 47.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—Winterbottom v. Wright, 62.

Where, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.—Thomas v. Winchester, 65.

Letters of administration granted by a surrogate are conclusive as to the authority of the administrator therein named to bring an action given by law to the personal representatives of one deceased, in an action by the administrator under such a law.—Leonard v. Columbia Steam Nav. Co., 265.

A single trespass may be committed on several closes, and one action maintained therefor as one trespass.—Halligan v. Chicago & R. I. R. Co., 154.

Different acts of several defendants, being all parts of one scheme to injure plaintiff, constitute but one cause of action.—Rice v. Coolidge, 13.

Personal actions are transitory, and governed by the *lex fori*.—Leonard v. Columbia Steam Nav. Co., 265.

That action is without precedent, although a strong objection, is without weight where adoption of new remedy is necessary to prevent a failure of justice, or to enforce settled principles of law.—Lamb v. Stone, 9; Rice v. Coolidge, 13, 15.

Where performance of right or duty created by law is assumed by contract, action for breach may be either *ex contractu* or *ex delicto*.—Baltimore City Pass. Ry. Co. v. Kemp, 54.

Action of trespass *vi et armis* lies if the damage complained of is the immediate effect of the act of the defendant; if consequential only, and not immediate, case is the proper remedy.—Brown v. Kendall, 52.

Distinction between action of trespass and action on the case not material on review of judgment on the merits where declaration, in action brought before justice of the peace, is ambiguous as to form of action.—Vandenberg v. Truax, 38.

Failure of plaintiff to have writ returned, or to appear at the court to which it is returnable, a final determination of the action.—Cardinal v. Smith, 102.

ADJOINING LAND-OWNERS.

Owner of land may improve it in his own way, if he violates no duty to any adjacent owner, or to the public.—Gramlich v. Wurst, 7.

One adjoining land-owner liable for injury to soil of another, by removal of lateral support therefrom; but not for injury to house built thereon, where no prescriptive right exists.—Thurston v. Hancock, 23.

Not liable for opening wells on his own land and drawing water therefrom, although supply of water to wells on another's land is diminished thereby.—Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park, 26.

Not liable for opening wells on his own land, although subsidence of surface of land of another is caused thereby, if this occasions no appreciable damage.—Smith v. Thackerah, 30.

Not liable for obstruction of access of light or air to adjacent land, unless adverse right thereto has been acquired.—Guest v. Reynolds, 1.

One of two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor, although he would be liable for such trespass by cattle rightfully on his land.—Lawrence v. Combs, 163.

Adverse Possession.

See *Prescription*.

ADVERSE RIGHTS.

To easement of light and air not acquired by prescription.—Guest v. Reynolds, 3; Miller v. Woodhead, 4.

AFFRAY.

Right of recovery for injuries received in affray not affected by consent of combatants to fight together.—Engelhardt v. State, 73; Barholt v. Wright, 74.

Officer may arrest, without a warrant, persons engaged in affray, while it is going on, but not after it is over, unless there is danger of its immediate renewal.—Quinn v. Heisel, 96; Phillips v. Trull, 97.

A private person may arrest, without a warrant, persons engaged in affray, while it is going on, but not after it is ended.—Phillips v. Trull, 97.

Agency.

See *Principal and Agent*.

Agreements.

See *Contracts*.

ANCIENT LIGHTS.

English doctrine not applicable in Illinois.—Guest v. Reynolds, 3; Miller v. Woodhead, 4.

ANIMALS.

Owner of domestic animals liable for injuries committed by them while trespassing on the close of another, irrespective of his knowledge of their vicious propensities; but not liable for injuries by them unless they were trespassing, or he had knowledge of their vicious propensities.—*Van Leuven v. Lyke*, 152; *Marshall v. Welwood*, 222.

One of two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor; although he would be liable for such trespass by cattle rightfully on his land.—*Lawrence v. Combs*, 163.

The owner of an ox which, while being driven along the highway, escapes and enters premises of another adjoining the highway, is not liable for the damages thereby done, unless there was negligence on his part.—*Tillett v. Ward*, 162.

Owner of cattle is bound to prevent them from escaping from his land and doing mischief; but, with regard to tame beasts having no exceptionally vicious disposition so far as known, the owner is not liable for the hurt they may inflict upon the persons of others.—*Marshall v. Welwood*, 221.

One keeping a mischievous or vicious animal, with knowledge of its propensities, is bound to keep it secure at his peril; he cannot excuse himself from liability for injuries inflicted by it by proof of due care.—*Muller v. McKesson*, 191.

The negligence of a servant in loosing his master's ferocious dog is no defense to an action for the injury caused by the dog to a fellow-servant, as the *gravamen* of the action is the keeping of a ferocious animal with knowledge of its nature, and not the negligent care of it.—*Muller v. McKesson*, 191.

A person in the employ of another, charged with specific duties, does not, while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.—*Muller v. McKesson*, 191.

The negligence of the owner of an animal in leaving it fettered in the highway does not preclude his maintaining an action for the killing of the animal occasioned by the negligent act of the driver of a wagon in running into it, if the driver's negligence was the proximate cause of the injury, and if he might have avoided it by exercise of ordinary care.—*Davies v. Mann*, 225.

The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, is to be regarded as a fraud, if the fact of the disease is not disclosed.—*Grigsby v. Stapleton*, 253.

APPEAL.

Where interest, not given by the verdict, is inserted in the judgment, without authority, the proper remedy is by motion to correct the judgment, and not by appeal.—*Leonard v. Columbia Steam Nav. Co.*, 265.

In an action for damages caused by neglect to provide fire-escapes for a tenement-house, as required by statute, the admission in evidence of a copy of the specifications adopted by commissioners under the statute, as to the material and manner of constructing the fire-escape, being wholly immaterial and harmless, is not ground for reversal.—*Willy v. Mulledy*, 17.

APPORTIONMENT.

No apportionment of damages between joint tort-feasors.—*Keegan v. Hayden*, 68.

ARREST.

Of person who has committed a felony, justifiable without a warrant.—*Holley v. Mix*, 93; *Carl v. Ayers*, 94.

For breach of the peace, while it continues, justifiable without warrant.—*Quinn v. Heisel*, 96; *Phillips v. Trull*, 97.

By officer, without warrant, on charge of felony, justifiable, though no felony committed, if made upon reasonable grounds of suspicion.—*Holley v. Mix*, 93.

By officer, without a warrant, for a past offense, not a felony, is not justified by information or suspicion.—*Quinn v. Heisel*, 96.

By officer, without warrant, is not justified by a threat or other indication of a breach of the peace, unless the facts warrant a belief that the arrest is necessary to prevent the commission of the offense, without reference to any past similar offense of which the person may have been guilty before the officer's arrival.—*Quinn v. Heisel*, 96.

By private person, without warrant, for felony, where no felony committed, is illegal.—*Holley v. Mix*, 93.

By private person, on charge of felony, justifiable, if such felony was in fact committed, and there is reasonable ground to suspect the person arrested.—*Holley v. Mix*, 93; *Carl v. Ayers*, 94.

Warrant regular on its face, sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 216.

Arrest under warrant void on its face, ground for action for false imprisonment.—*Geizenleuchter v. Niemeyer*, 88.

Action maintainable for arrest which is a malicious abuse of process.—*Grainger v. Hill*, 107.

Arrest may be made without actually touching the person.—*Grainger v. Hill*, 107.

ASSAULT AND BATTERY.

Riding after a person, so as to compel him to run to shelter to avoid being beaten, is, in law, an assault.—*Martin v. Shoppee*, 71.

Advancing in a threatening attitude and with intent to strike another, so that the blow would almost immediately reach him, is, in law, an assault by the person advancing with such intent, although he is stopped before he is near enough to the other to strike him.—*Stephens v. Myers*, 71.

Raising a stick, within striking distance of another, as if to strike him, although that is prevented by the other wrenching the stick from the assailant, constitutes a criminal assault.—*Engelhardt v. State*, 73.

Aiming and firing a loaded pistol in the direction of another constitutes a criminal assault.—*Engelhardt v. State*, 73.

Pointing an unloaded gun at one who supposes it to be loaded, although within the distance it would carry if loaded, is not, without more, an assault punishable criminally, although it may sustain a civil action for damages.—*Chapman v. State*, 70.

To touch another in anger, though in the slightest degree, or under pretense of passing, is, in law, a battery.—*Cole v. Turner*, 72.

Laying hold of another's person in a rude and hostile manner is a battery.—*Engelhardt v. State*, 73.

Action maintainable for assault and battery by negligence without wrongful intent.—*Weaver v. Ward*, 49.

Action maintainable for assault and battery by explosion of lighted squib first thrown by defendant, although plaintiff would not have been injured without intervention of others.—*Clark v. Chambers*, 33; *Vandenburgh v. Truax*, 37; *Morain v. Devlin*, 50.

Action not maintainable for injury from a blow which was the result of pure accident, or was involuntary and unavoidable.—*Brown v. Kendall*, 51.

To constitute a criminal assault there must be a present purpose to do injury.—*State v. Crow*, 72.

Words accompanying menacing acts and indicating that there is no intent to do actual violence may be considered on the question whether such acts constitute an assault.—*State v. Crow*, 72.

Where two combatants fight together willingly, neither in self-defense, each is guilty of an assault and battery on the other.—*Engelhardt v. State*, 73.

No defense to action for assault and battery that the acts complained of were committed in a

fight engaged in by mutual consent, although such consent may be shown in mitigation of damages.—*Barholt v. Wright*, 74.

Assault in defense of property justifiable, unless unreasonable force is used.—*Scribner v. Beach*, 75; *Commonwealth v. Donahue*, 77; *Newkirk v. Sabler*, 151.

Assault by servant of carrier in expelling passenger for wanton violation of reasonable regulation justifiable, unless more force is used than necessary for the purpose, or a dangerous or inconvenient place is selected for such expulsion.—*Illinois Cent. R. Co. v. Whittemore*, 79.

Assault by officer in overcoming unlawful resistance to service of process justifiable, unless excess of force is used by him.—*Hager v. Danforth*, 81.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as the offense.—*Sheehan v. Sturges*, 80.

ATTACHMENT.

Action maintainable for malicious prosecution of civil action by attachment against property of the defendant therein.—*Bump v. Betts*, 107.

Where a proceeding by attachment against property is brought in the absence of the defendant therein, and he has no opportunity to defend, he need not show a termination of the proceeding in his favor in order to maintain an action for malicious prosecution therefor.—*Bump v. Betts*, 107.

Fraudulent purchase of debtor's goods to prevent attachment not ground of action by creditor for damages for fraud.—*Lamb v. Stone*, 8.

Purchaser from attachment debtor, of goods attached in his hands, entitled to equitable set-off for advances made to or debts paid for principal debtor in good faith.—*Lamb v. Stone*, 10.

ATTORNEYS.

Court of general criminal jurisdiction has power to strike from the roll of attorneys practicing in the court the name of an attorney guilty of misconduct which is ground for such an order.—*Bradley v. Fisher*, 206.

Misconduct by an attorney in threatening a judge presiding at a trial, as he was descending from the bench, with personal chastisement for his alleged conduct during the trial, is ground for striking the name of such attorney from the roll of attorneys practicing in the court.—*Bradley v. Fisher*, 206.

Where a court has power to make an order striking the name of an attorney from the roll of attorneys practicing in the court, error in not citing the attorney, before making such an order, to show cause why it should not be made, however it may affect the validity of the act, does not make it any the less a judicial act, nor does it render the judge making the order liable in damages to the attorney, as though the court had proceeded without jurisdiction.—*Bradley v. Fisher*, 206.

An attorney causing issue of void or irregular process is liable for loss or injury thereby occasioned to parties against whom it is enforced.—*Fischer v. Langbein*, 90.

Attorneys for defendants in an action, who oppose a motion by plaintiff therein for his discharge from imprisonment under a commitment for contempt, he alleging that he has complied with the terms of the commitment, are not thereby rendered liable to an action by him for false imprisonment because of his alleged false imprisonment thereafter.—*Fischer v. Langbein*, 90.

One who, in instituting an alleged malicious prosecution, submitted all the facts of the case which he knew were capable of proof fairly to his counsel, and acted *bona fide* on the advice given, is not liable to an action therefor, even though the facts did not warrant the advice and the prosecution.—*Walter v. Sample*, 101.

BAILMENT.

Bailee of a chattel, who fails to restore it to the rightful owner, but delivers it to another not entitled to receive it, though under an honest mistake of fact, liable in trover for its conversion.—*Esmay v. Fanning*, 203.

Rule of civil law allowing bailee to restore property to place from which he took it, in case no place for such delivery was agreed on, not adopted.—*Esmay v. Fanning*, 204.

Bailee of a chattel, having received it in good faith from a person other than the owner, not liable for conversion by refusing to deliver it to the owner on demand, until he has had time to satisfy himself as to the ownership.—*Singer Manuf'g Co. v. King*, 205.

One who hires a horse to drive to a particular place, and drives beyond the place or in another direction, is liable for a conversion.—*Freeman v. Boland*, 200.

See *Landlord and Tenant*; *Loans*; *Warehouse men*.

BALLOON.

Action maintainable for injuries to property from the descent thereon of a balloon in which defendant had ascended, including damage done by third persons coming to defendant's assistance.—*Guille v. Swan*, 49.

Battery.

See *Assault and Battery*.

BELLS.

Ringling the bell of a church, built upon a public street in a thickly-settled part of a town, in such manner as to materially affect the health or comfort of all in the vicinity, whether residing or passing there, constitutes a public nuisance.—*Rogers v. Elliott*, 177.

But one who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly-populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.—*Rogers v. Elliott*, 176.

Use of bells by employers for purpose of giving notice to their workmen, although such as to cause injury to individuals which a court of equity would restrain, may be authorized by legislature, subject to regulation by municipal authorities.—*Sawyer v. Davis*, 186.

BLASTING.

Blasting rocks with gunpowder so that the fragments are liable to injure adjoining dwelling-houses, or persons living or traveling there, constitutes a nuisance.—*Heeg v. Licht*, 178.

BREACH OF THE PEACE.

Self-defense an excuse.—*Scribner v. Beach*, 76.

Arrest for breach of the peace, while it continues, justifiable without warrant.—*Quinn v. Heisel*, 96; *Phillips v. Trull*, 97.

BRICK-KILNS.

Burning brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brick-burning is a useful and necessary industry.—*Campbell v. Scaman*, 164.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick-kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance.

sance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln.—*Campbell v. Seaman*, 164.

BROKERS.

Broker having right to sell and deliver property not liable for conversion in selling at a price less than that fixed by his instructions.—*Lavery v. Snethen*, 197.

BURDEN OF PROOF.

In an action for a personal injury to plaintiff by a blow inflicted unintentionally by defendant while doing a lawful act, the burden is on plaintiff to show that defendant is chargeable with some fault, negligence, carelessness, or want of prudence.—*Brown v. Kendall*, 53.

CARRIERS.

Rule requiring railway passengers to surrender their tickets on the trains, a reasonable regulation.—*Illinois Cent. R. Co. v. Whittemore*, 79; *Lynch v. Metropolitan El. Ry. Co.*, 86.

Railroad company may expel passenger from train for wanton refusal to comply with rule requiring surrender of tickets on the train, using no more force than necessary for the purpose, and not selecting a dangerous or inconvenient place.—*Illinois Cent. R. Co. v. Whittemore*, 79; *Lynch v. Metropolitan El. Ry. Co.*, 87.

Statute forbidding railroad companies to expel passengers from trains for non-payment of fare, at any place other than a regular station, does not apply to a refusal by a passenger to surrender his ticket, as required by a rule of the company.—*Illinois Cent. R. Co. v. Whittemore*, 79.

Regulation by a railroad company that a passenger, who fails, before leaving its trains or premises, to produce a ticket or pay his fare, shall be detained until he does so, is illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 86.

Carrier has a lien for fare on baggage of passenger, but not on his person.—*Lynch v. Metropolitan El. Ry. Co.*, 87.

Common carrier of passengers owes to a passenger a duty to be careful, irrespective of contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

Negligence of person in charge of a public conveyance cannot be imputed to a passenger therein, who is injured by the joint negligence of such persons and those in charge of another conveyance, to defeat his action against the latter.—*Mills v. Armstrong*, (*The Bernina*), 233.

CELLAR-DOORS.

Action maintainable for personal injuries caused by fall of flap of cellar-door, left raised and unfastened by negligence on part of defendant, although its fall was caused by intervening act of third person.—*Clark v. Chambers*, 34.

CERTIORARI.

Writ lies, at common law, only to officers exercising judicial powers, and to remove proceedings of a judicial character.—*Weaver v. Devendorf*, 211.

Children.

See *Infancy*.

CIPHER.

That a libelous statement by a mercantile agency to its subscribers was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 142.

CHASE—18

CIVIL LAW.

Rule as to right of drainage of surface waters, as between owners of adjacent lands, of different elevations, governed by the law of nature; but is not adopted in all the states.—*Barkley v. Wilcox*, 171.

Rule allowing bailee to restore property to place from which he took it, in case no place for such delivery was agreed on, not adopted.—*Esmay v. Fanning*, 204.

COLLOQUIUM.

In an action for slander in speaking words which are slanderous only by reference to facts and circumstances set forth in plaintiff's declaration, the *colloquium*, or averment that the words were spoken of and concerning such circumstances, must extend to the whole of the prefatory inducement necessary to render the words actionable. An omission in this respect cannot be aided by mere innuendoes, nor by averments that defendant had knowledge of the particular circumstances stated.—*Brettun v. Anthony*, 147.

COMMON LAW.

Legal rights may be established by common law, in cases of novel impression.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 11; *Rice v. Coolidge*, 13.

Doctrine as to easements of light and air not adopted in Illinois.—*Guest v. Reynolds*, 3; *Miller v. Woodhead*, 4.

Rule that words imputing unchastity to a woman are not actionable unless special damage be shown has been changed by statute in many of the United States.—*Roberts v. Roberts*, 23, 30, note.

Common law presumed to prevail in a state the law of which is not proved.—*Leonard v. Columbia Steam Nav. Co.*, 266.

CONCEALMENT.

On a sale of an article for a particular purpose, the suppression by the vendor of a latent defect which makes the article unfit for such purpose is a deceit.—*Grigsby v. Stapleton*, 259.

One who sells cattle, which he knows have a contagious disease, not easily detected except by those acquainted with it, for a sound price, to a purchaser having no knowledge of the fact, if he does not disclose the fact to the purchaser, is guilty of fraudulent concealment of a latent defect, which will defeat an action for the price; under such circumstances, the rule *caveat emptor* does not apply.—*Grigsby v. Stapleton*, 258.

CONFIDENTIAL COMMUNICATIONS.

Confidential advice or communication to persons asking therefor, or having a right to expect it, not ground for action of slander or libel unless malice in fact be shown.—*Bromage v. Prosser*, 129.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another; nor because they are uttered after the most urgent solicitation; nor because the interview in which they are uttered is obtained at the instance of the person slandered.—*Byam v. Collins*, 139.

That a libelous statement by a mercantile agency to its subscribers was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 142.

CONFLICT OF LAWS.

Personal actions are transitory, and governed by the *lex fori*.—*Leonard v. Columbia Steam Nav. Co.*, 215.

Statutes of one state can have no operation in another where similar statutes do not exist; but

a right of action given by a statute of one state may be enforced in the courts of another state having a substantially similar statute, as if such right of action existed by the common law of both states.—*Leonard v. Columbia Steam Nav. Co.*, 265.

CONSENT.

Not a justification for an assault, but merely ground of mitigation of damages.—*Barholt v. Wright*, 74.

CONSORTIUM.

Loss of *consortium vicinorum* not such special damage as will sustain action for slander in speaking words not actionable in themselves.—*Roberts v. Roberts*, 29.

An action may be maintained by a husband for the loss of *consortium* with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 216.

CONSPIRACY.

Where the acts charged against several defendants would not be actionable, if done by one alone, they are not made actionable by being done by several in pursuance of a conspiracy.—*Rice v. Coolidge*, 14.

Action maintainable for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages.—*Van Horn v. Van Horn*, 109.

The *gravamen* in such an action is not the conspiracy, but the malice; the conspiracy is matter of aggravation or inducement only, in the pleading and evidence, under which one or all of the defendants may be found guilty.—*Van Horn v. Van Horn*, 109.

Constables.

See *Officers*.

CONSTITUTIONAL LAW.

An act of the legislature, which directs or allows that to be done which would otherwise be a nuisance, is valid, unless it can fairly be said to be an unwholesome and unreasonable law.—*Sawyer v. Davis*, 186.

An injunction restraining the ringing of a factory bell, used to notify employes, before a certain hour in the morning, does not give a vested right which the legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.—*Sawyer v. Davis*, 186.

CONTAGIOUS DISEASES.

Words imputing are actionable.—*Golderman v. Stearns*, 116.

The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, is to be regarded as a fraud, if the disease is latent, and is not disclosed by the vendor.—*Grigsby v. Stapleton*, 253.

CONTEMPT.

Misconduct by an attorney in threatening a judge presiding at a trial, as he was descending from the bench, with personal chastisement for his alleged conduct during the trial, is ground for striking the name of such attorney from the roll of attorneys practicing in the court.—*Bradley v. Fisher*, 206.

Error of law in adjudging a party guilty of contempt and ordering him to be committed therefor, he having disobeyed an order of the court, and the only question being whether his disobedience de-

feated, impaired, impeded, or prejudiced any right or remedy of the defendants, does not affect the jurisdiction of the court, nor render the commitment void; and such party cannot maintain an action for false imprisonment for his arrest and imprisonment under the commitment.—*Fischer v. Langbein*, 90.

CONTRACTS.

Omission to perform a contract obligation, if also an omission of a legal duty, may constitute a tort, even where such legal duty arises from circumstances not elements of the contract, but merely connected with it and dependent upon it.—*Rich v. New York Cent. & H. R. R. Co.*, 56.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 62.

But where, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.—*Thomas v. Winchester*, 65.

Dealer in medicines selling, as a harmless remedy, a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 65.

Duty of care on the part of a common carrier of passengers towards a passenger exists irrespective of contract, and its violation is a tort.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

Action not maintainable by one party to a contract against a third person for persuading the other party to the contract not to perform it.—*Mobile Life Ins. Co. v. Brame*, 248.

It seems that one who procures another to break a contract by the latter with a third party is responsible for the breach only where malice to such third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—*Van Horn v. Van Horn*, 110.

CONTRIBUTION.

No contribution between joint tort-feasors, in respect of an act which the party must be presumed to have known to be unlawful.—*Armstrong County v. Clarion County*, 68.

CONTRIBUTORY NEGLIGENCE.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.—*Baltimore & P. R. Co. v. Jones*, 223.

Negligence of a plaintiff precludes him from recovering in an action for defendant's negligence, where he could, by ordinary care, have avoided the consequences of defendant's negligence.—*Davies v. Mann*, 225.

Action not maintainable for injury to plaintiff from a blow by negligence of defendant, if plaintiff was also chargeable with negligence contributing as an efficient cause to the injury.—*Brown v. Kendall*, 51.

Owner of tenement-house who has failed to provide fire-escapes therefor as required by statute is not relieved from liability for damage thereby caused to a tenant, by the fact that the tenant had occupied the premises for a few days previous to the fire causing the damage.—*Willy v. Mulledy*, 16.

Doctrine does not apply to cases of commission of intentional wrong.—*Barholt v. Wright*, 74.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

But even a child is bound to use such reasonable care as one of his age and mental capacity is ca-

pable of using; and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

CONVERSION OF PERSONAL PROPERTY.

Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.—*Laverty v. Sneathen*, 197.

To constitute a conversion, there must be acts amounting to a repudiation of the owner's right in the property, or an exercise of ownership over it inconsistent with such right, or some act done which destroys or changes the quality of the property.—*Frome v. Dennis*, 199.

Refusal, by one who has the chattel of another, to deliver it to the owner or his agent on demand, is evidence of conversion.—*Singer Manuf'g Co. v. Rice*, 205.

The gist of the action of trover is the conversion and deprivation of plaintiff's property; not the acquisition of property by defendant.—*Esmay v. Fanning*, 204.

Bailee of chattel who fails to restore it to the rightful owner, but delivers it to another not entitled to receive it, though under an honest mistake of fact, liable in trover for its conversion.—*Esmay v. Fanning*, 203.

Borrower of a carriage who, having received it from a livery stable where it was stored for the lender, returns it to such livery stable after the keeper of the stable has ceased to be the agent of the lender, liable to the latter for a conversion.—*Esmay v. Fanning*, 203.

Where personal property comes lawfully into the possession of a person other than the owner, a demand is necessary before trover can be maintained for its conversion, unless such person has committed some wrongful act in connection therewith which amounts to an actual conversion.—*Esmay v. Fanning*, 204.

One who, having no knowledge of the ownership of property, borrows it of the persons having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, not liable for a conversion, in an action by the true owner.—*Frome v. Dennis*, 199.

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.—*Frome v. Dennis*, 199.

A person, though an infant, who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.—*Freeman v. Boland*, 200.

An agent who parts with the property of his principal in a way or for a purpose not authorized, is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion.—*Laverty v. Sneathen*, 197.

One to whom a promissory note is delivered by the payee to be negotiated, with instructions not to part with the possession of it without receiving the money, and who delivers the note to a third person under the promise of the latter to get it discounted and return the proceeds, is liable to the payee, as for a conversion of the note, for the loss by the appropriation of the proceeds of the note by such third person.—*Laverty v. Sneathen*, 197.

Bailee of chattel, having received it in good faith from a person other than the owner, not liable for conversion by refusing to deliver it to the owner on demand, until he has had time to satisfy himself as to the ownership.—*Singer Manuf'g Co. v. King*, 205.

Agent who, having received a chattel from a fellow-employee with directions not to deliver it to the owner until certain storage charges are paid, refuses to deliver it to the owner on demand because the latter will not pay such charges, neither he nor his principal having any right to impose such a condition, is liable to the owner for a conversion.—*Singer Manuf'g Co. v. King*, 205.

Taking the property of another without his consent, by abuse of the process of the law, is of itself a conversion, without a demand and refusal.—*Grainger v. Hill*, 107.

Conversion of personal property an injury to the right of possession.—*Armory v. Delamirie*, 201; *Gordon v. Harper*, 201.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.—*Armory v. Delamirie*, 201.

Trover will not lie unless at the time of the conversion the possession or right to the immediate possession of the property was in plaintiff.—*Gordon v. Harper*, 201.

Owner of personal property leased to another cannot maintain trover for a conversion pending the demise.—*Gordon v. Harper*, 201.

Sale and delivery, by one tenant in common of personal property, of the entire property as exclusively his own, is a conversion, for which his co-tenant can maintain trover.—*Weld v. Oliver*, 202.

In an action of trover for the removal by defendant from a jewel of precious stones, the value of which is not known, and which defendant does not produce, the strongest presumption is against him, and the measure of damages is the value of the best stones that would fit the socket.—*Armory v. Delamirie*, 201.

CORPORATIONS.

A statement by directors of a tramway company in a prospectus issued by them for the purpose of obtaining subscriptions to shares in the company, that by their charter the company had the right to use steam power instead of horses, when in fact the company had such right only if the consent of the board of trade should be obtained, and such consent was afterwards refused, is not ground for an action of deceit against the directors by one who took shares in the company, relying upon such false representation, if the statement was made by the directors in the honest belief that it was true.—*Derry v. Peek*, 249.

Co-Tenancy.

See *Joint Tenancy and Tenancy in Common*.

COUNTIES.

Liability for injuries from breaking down of a bridge jointly maintained by two counties not the subject of contribution between them.—*Armstrong County v. Clarion County*, 63.

COURTS.

Court of general criminal jurisdiction has power to strike from the roll of attorneys practicing in the court the name of an attorney guilty of misconduct which is ground for such an order.—*Bradley v. Fisher*, 206.

CRIMINAL CONVERSATION.

Action maintainable by husband for loss of *consortium* with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 216.

CRIMINAL LAW.

Wrongful intent necessary to constitute crime.—*Bessey v. Olliot*, 49.

Lunatic not liable to indictment and punishment.—*Morain v. Devlin*, 51.

DAMAGES.

Action not maintainable for act not in itself unlawful, where no damage is sustained.—*Roberts v. Roberts*, 28; *Smith v. Thackerah*, 30; *Upton v. Vail*, 31.

An entry upon land of another without his permission, express or implied, or the license or authority of law, constitutes a trespass, for which damages are recoverable, though merely nominal.—*Hatch v. Donnell*, 150; *Newkirk v. Sabler*, 151.

Owner of land in which another has an easement may recover from the latter for injury wantonly and unnecessarily done by him in the use of his privileges, without proof of any particular amount of damages sustained.—*Dixon v. Clow*, 18.

The law presumes that damages result from the speaking of words charging a physician with gross ignorance and unskillfulness in his profession.—*Secor v. Harris*, 119.

Fraud and damage together constitute a cause of action.—*Upton v. Vail*, 31; *Hickey v. Morrell*, 262.

Action for tort not maintainable where damages are too remote, contingent, or indefinite.—*Lamb v. Stone*, 9, 10; *Clark v. Chambers*, 32; *Vandenburgh v. Truax*, 37; *Lowery v. Manhattan Ry. Co.*, 38; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 41; *Moody v. Baker*, 44; *Bowen v. Hall*, 46.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Vandenburgh v. Truax*, 37.

Cancer of the breast, if found to be the result of an injury to plaintiff caused by defendant's negligence, may be considered in estimating damages in an action for such injury.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

Act causing death of a human being, though clearly involving pecuniary loss, not ground of action for damages at common law.—*Mobile Life Ins. Co. v. Brame*, 247.

Special damages need not be alleged in order to set forth a cause of action where the natural and necessary consequences of the wrongful acts charged is to injure plaintiff.—*Rice v. Coolidge*, 13.

Action maintainable for special damage caused by untrue statement disparaging quality of plaintiff's goods, made without lawful occasion.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 11.

Although one who has entered into a contract to purchase land is influenced to desire to withdraw therefrom by statements as to the vendor's title made by a third person, if the vendor assents to a rescission of the contract, he cannot recover damages from the third party for the loss of the sale, as it is not the legal consequence of the words spoken.—*Kendall v. Stone*, 149.

Words not actionable in themselves may be actionable as causing special damage to the person of whom they are spoken in his office, profession, trade, employment, etc.—*Forward v. Adams*, 116; *Ireland v. McGarvish*, 118; *Secor v. Harris*, 119.

Loss of membership in religious society, to which no material advantages are attached, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 28.

That a person under contract of marriage with plaintiff broke off the contract in consequence of words spoken of plaintiff by defendant is such special damage as will sustain an action for slander, although the words are not actionable in themselves.—*Moody v. Baker*, 44.

Damages cannot be apportioned between joint tort-feasors.—*Keegan v. Hayden*, 68.

That the injuries complained of were inflicted in a fight engaged in by the parties by mutual consent may be shown in mitigation of damages.—*Barholt v. Wright*, 74.

Evidence of the truth of the charge, for making which an action of slander is brought, is not admissible in mitigation of damages.—*Van Ankin v. Westfall*, 113.

In an action against a sheriff for a wrongful levy

of an execution on plaintiff's goods, the fact that the sheriff paid the proceeds of the sale to the judgment creditor will not serve to mitigate the damages.—*Welsh v. Wilson*, 215.

DEATH.

Act causing the death of a human being, though clearly involving pecuniary loss, not the ground of an action for damages at common law.—*Mobile Life Ins. Co. v. Brame*, 247.

Action maintainable against owner of tenement-house for damages for death of tenant caused by failure of owner to provide fire-escapes, as required by statute.—*Willy v. Mulledy*, 16.

Where, by a collision between two steam-ships, through negligence of the masters and crews of both, a person on board one of them, having nothing to do with the negligent navigation, is drowned, an action may be maintained against the owners of the other vessel for damages for his death, under a statute giving a right of action to personal representatives of a deceased person for injuries causing his death.—*Mills v. Armstrong*, (*The Bernina*), 233.

Action given by statute of one state to executor or administrator of deceased person to recover damages for his death, caused by negligence, maintainable in courts of another state having substantially similar law, on proof of the law of the former state.—*Leonard v. Columbia Steam Nav. Co.*, 265.

No justification admissible where life of one person has been lost by negligence of another, whether by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 66.

Insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, the loss thereby caused the company being too remote and indirect.—*Mobile Life Ins. Co. v. Brame*, 247.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir.—*Mobile Life Ins. Co. v. Brame*, 248.

DECEIT.

Proof of actual fraud necessary, in England, to support action to recover damages for deceit.—*Derry v. Peek*, 249.

Action maintainable for damages sustained from a false representation made by defendant, knowing it to be false, or without belief in its truth, or recklessly, without caring whether it be true or false.—*Derry v. Peek*, 249.

But a false statement, made through carelessness, and without reasonable ground for believing it to be true, although it may be evidence of fraud, does not, according to the English rule, necessarily constitute fraud; and such a statement, made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.—*Derry v. Peek*, 249.

A statement by directors of a tramway company, in a prospectus issued by them for the purpose of obtaining subscriptions to shares in the company, that by their charter the company had the right to use steam-power instead of horses, when in fact the company had such right only if the consent of the board of trade should be obtained, and such consent was afterwards refused, is not ground for an action of deceit against the directors by one who took shares in the company, relying upon such false representation, if the statement was made by the directors in the honest belief that it was true.—*Derry v. Peek*, 249.

In action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 255.

Action maintainable, in Massachusetts, for damages for false representations by defendant, in stating, as of his own knowledge, material facts susceptible of knowledge, which were false, al-

though he did not know them to be false; that he believed them to be true is no defense.—*Litchfield v. Hutchinson*, 257.

When the real quality of property sold is obvious to ordinary intelligence, and the vendor and vendee have equal knowledge or equal means of acquiring information, and the truth or falsity of representations made by the vendor as to its quality may be ascertained by the vendee by the exercise of ordinary inquiry or diligence, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, which every prudent person ought to make, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.—*Long v. Warren*, 263.

Action not maintainable by purchaser of a farm against the vendor for false representations by the latter, to induce the purchase, in regard to the absence of a noxious grass from the farm, where it appears that any attempt to find such grass on the farm, made before the purchase, would have disclosed its existence.—*Long v. Warren*, 263.

A statement by a warehouseman in a circular soliciting patronage that the exterior of his warehouse is fire-proof is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fire-proof, may recover from the warehouseman for the loss so incurred.—*Hickey v. Morrell*, 260.

On a sale of an article for a particular purpose, the suppression by the vendor of a latent defect which makes the article unfit for such purpose is a deceit.—*Grigsby v. Stapleton*, 259.

Action not maintainable where damages too remote, indefinite, and contingent.—*Lamb v. Stone*, 10.

Action maintainable for false representations by defendant to plaintiff as to solvency of third person, whereby plaintiff was induced to give credit to the latter, and lost his debt.—*Upton v. Vail*, 31.

See *Fraud*.

DEED.

Presumed as grounds for rights by prescription.—*Thurston v. Hancock*, 24.

Defamation.

See *Libel*, *Slander*; *Subornation of Perjury*.

DEMAND.

Refusal, by one who has the chattel of another, to deliver it to the owner or his agent on demand, is evidence of conversion.—*Singer Manuf'g Co. v. King*, 205.

Where personal property comes lawfully into the possession of a person other than the owner, a demand is necessary before trover can be maintained for its conversion, unless such person has committed some wrongful act in connection therewith which amounts to an actual conversion.—*Esmay v. Fanning*, 204.

Refusal to deliver personal property to the owner on demand is not necessarily evidence of conversion, if delivery was impossible.—*Frome v. Dennis*, 199.

Not necessary before suit against a sheriff or constable for a wrongful seizure and sale, under execution, of property not belonging to the execution debtor.—*Boulware v. Craddock*, 214.

DETINUE.

Action of trover a substitute for the action of detinue.—*Gordon v. Harper*, 201.

DOGS.

Not being animals *feræ naturæ*, an action at law lies for destroying them, although, at common law, the stealing of them does not amount to larceny.—*White v. Brantley*, 194.

A dog accustomed to bite persons is a public nuisance, and may be killed by any one when found running at large.—*Muller v. McKesson*, 191.

The act of the owner of one of two dogs engaged in a fight, in attempting to part them, is a lawful and proper act, which he may do by proper and safe means, and he is not liable for an injury thereby done to another, which is the result of pure accident, or is involuntary and unavoidable.—*Brown v. Kendall*, 53.

See *Animals*.

DOG-SPEARS.

Use held not illegal, in a case of injury to a dog; but, *it seems*, otherwise, in case of injury to a human being.—*Clark v. Chambers*, 33.

DOORS.

Officer may enter outer door of dwelling peaceably for purpose of serving process upon person within.—*Hager v. Danforth*, 81.

Not lawful for officer, in order to serve civil process, to break open outer door of dwelling of the party, although such dwelling is also used by the party for transaction of business.—*Welsh v. Wilson*, 215.

DRAINAGE.

Owner of land so situated that surface waters from the land above naturally descend upon and pass over it, may, in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.—*Barkley v. Wilcox*, 170.

Action maintainable for obstructing drain.—*Webb v. Portland Manuf'g Co.*, 21.

EASEMENTS.

By prescription, founded on presumption of grant.—*Thurston v. Hancock*, 25.

Of light and air, not acquired by prescription of 20 years.—*Guest v. Reynolds*, 3; *Miller v. Woodhead*, 4.

One having an easement in the land of another is liable for any injury to the land wantonly and unnecessarily done by him in the use of his privileges.—*Dixon v. Clow*, 18.

ELECTION OF REMEDY.

Where, by negligence or wrongful act on the part of a common carrier of passengers, a personal injury is suffered by a passenger, he may sue for a breach of the contract, if there is one, or, at his election, may proceed as for a tort.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

ELECTIONS AND VOTERS.

Violation of the right to vote at election a ground of action.—*Webb v. Portland Manuf'g Co.*, 20; *Smith v. Thackerah*, 30.

ELEVATED RAILWAYS.

Action maintainable for personal injuries to plaintiff from being run over on the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's elevated railway.—*Lowery v. Manhattan Ry. Co.*, 35.

ENGLISH DOCTRINE.

Of ancient lights, not applicable in Illinois.—*Guest v. Reynolds*, 3; *Miller v. Woodhead*, 4.

That where highway is obstructed temporarily, a traveler has a right to go upon adjoining lands, without being guilty of trespass, recognized in America.—*Campbell v. Race*, 160.

Action maintainable for speaking words imputing a criminal offense punishable corporally, though not indictable.—*Webb v. Beavan*, 112.

That judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in course of judicial proceedings, generally adopted in the American courts, with the qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements must be pertinent and material to the case.—*Rice v. Coolidge*, 14.

A false statement, made through carelessness and without reasonable ground for believing it to be true, although it may be evidence of fraud, does not, according to the English rule, necessarily constitute fraud; and such a statement, made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.—*Derry v. Peek*, 249.

Former doctrine by which the negligence of the persons in charge of a public conveyance was imputed to passengers therein, now overruled.—*Mills v. Armstrong*, (*The Bernina*.) 233.

EQUITY.

Will restrain repetition or continuance of injurious act which may become the foundation or evidence of an adverse right.—*Webb v. Portland Manuf'g Co.*, 19.

Will restrain pollution of a water-course by acts which tend to create a nuisance of a continuous and constantly accruing nature, for which an action at law can furnish no adequate relief.—*Merrifield v. Lombard*, 175.

A nuisance will be restrained, in order to prevent irreparable injury and a multiplicity of suits; even though the injury is only occasional.—*Campbell v. Seaman*, 166.

Acquiescence or laches may bar equitable relief against a nuisance.—*Campbell v. Seaman*, 167.

Although equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law, it will not restrain a party from enforcing his legal right upon the ground that it is of no value.—*Clinton v. Myers*, 175.

EVIDENCE.

In an action against a teacher for assault and battery in whipping a pupil, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.—*Sheehan v. Sturges*, 80.

In an action for a slander, whereby a contract of marriage between plaintiff and a third person was broken off by the latter, a conversation between such person and another, not offered to support testimony given by him in the case, but as independent evidence, is not admissible.—*Moody v. Baker*, 44.

In an action of trover, on the question of the possession by defendant of the property in question, declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, are admissible as part of the *res geste*.—*Frome v. Dennis*, 200.

Testimony of experts in the business of fire insurance not admissible on the question of the hazard and exposure of one building to fire from another, as dependent on the distance between them.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 41.

On the question of the probability that a person whose death was caused by a fire in a tenement-house would have escaped had a fire-escape been provided, as required by law, it may be inferred, from the construction of the house, and the struct-

ure of fire-escapes, where one would probably have been placed.—*Willy v. Mulledy*, 16.

The facts that a person, whose death was caused by a fire in a tenement-house, knew that there was a scuttle in the roof, had time after notice of the fire to reach it, and made efforts to escape, are sufficient to justify a jury in finding that such person tried to escape in that direction, and failed for want of a ladder to the scuttle, which the owner had not provided as required by the statute.—*Willy v. Mulledy*, 16.

EXCAVATIONS.

Owner excavating on his own land liable for loss of or injury to soil of adjoining land caused by removal of lateral support.—*Thurston v. Hancock*, 23.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable to injuries to trespasser falling into excavation.—*Gramlich v. Wurst*, 5.

EXECUTION.

A sheriff or constable who, under an execution, seizes and sells property not belonging to the judgment debtor, though in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.—*Boulware v. Craddock*, 214.

Levy of execution by breaking outer door of dwelling of execution debtor, invalid; and the fact that the sheriff making such levy sold the goods and paid the proceeds to the execution creditor is not available to him in mitigation of damages.—*Welsh v. Wilson*, 215.

EXECUTORS AND ADMINISTRATORS.

Action given by statute of one state to executor or administrator of deceased person to recover damages for his death, caused by negligence, maintainable in courts of another state having substantially similar law, on proof of the law of the former state.—*Leonard v. Columbia Steam Nav. Co.*, 265.

Letters of administration granted by a surrogate are conclusive as to the authority of the administrator therein named to bring an action given by law to the personal representatives of one deceased, in an action by him under such a law.—*Leonard v. Columbia Steam Nav. Co.*, 265.

EXPERT TESTIMONY.

Not admissible as to matters of common observation.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 42.

EXPLOSIVES.

Keeping or manufacturing gunpowder or fireworks, being a lawful business, does not necessarily constitute a nuisance; whether it does depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.—*Heeg v. Licht*, 178.

FALSE IMPRISONMENT.

Arrest without warrant, where warrant is by law necessary, constitutes false imprisonment.—*Holley v. Mix*, 93; *Carl v. Ayers*, 94; *Quinn v. Heisel*, 96; *Phillips v. Trull*, 97.

That arrest and detention complained of were under process is not a defense, where such process is void on its face.—*Gelzenleuchter v. Niemeyer*, 83.

Arrest of right person under wrong name, through misnomer in the process, without an allegation that the true name is unknown, is false imprisonment.—*Gelzenleuchter v. Niemeyer*, 90.

Obstructing the passage of a person in one direction only along a portion of a public highway, he

being free to go in another direction, does not amount to an imprisonment for which he can maintain an action for false imprisonment.—*Bird v. Jones*, 82.

Detention of passenger by carrier, for the purpose of enforcing payment of fare, illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 86.

The distinction between false imprisonment and malicious prosecution is that an imprisonment under legal process, in an action commenced and carried on maliciously and without probable cause, is malicious prosecution; and that false imprisonment is a trespass committed against a person by unlawfully arresting and imprisoning him without any legal authority.—*Gelzenleuchter v. Niemeyer*, 90.

One who instigates and procures an officer to arrest another upon a void warrant is liable to an action therefor.—*Rice v. Coolidge*, 14.

One causing the arrest of an innocent person on a charge of crime, upon a groundless suspicion, is liable to him in damages therefor.—*Carl v. Ayers*, 94.

Liability for arrest under void process attaches when wrong is committed, without such process being vacated or set aside; but process merely irregular must be vacated or annulled before an action can be maintained for damages from its enforcement.—*Fischer v. Langbein*, 90.

False Representations.

See *Deceit*; *Fraud*.

FELONY.

Arrest without warrant justifiable, if felony was committed by person arrested, or if a felony was in fact committed, and there is reasonable ground to suspect the person arrested, or, even if no felony was committed, where the arrest is made by an officer on a charge thereof upon information on which he had reason to rely.—*Holley v. Mix*, 93.

FENCES.

Tenant or owner not obliged to fence against adjoining owner or occupier, at common law, except by prescription; and, in that case, only against cattle rightfully in the adjoining close.—*Lawrence v. Combs*, 163.

Owner or occupant of land not required to fence it to prevent injuries to trespassers from falling into lawful excavation, not near highway.—*Gramlich v. Wurst*, 7.

Fence which obstructs access of light and air to house of adjoining owner not ground of action unless adverse right is invaded.—*Guest v. Reynolds*, 1.

FIRE.

Action not maintainable for destruction of plaintiff's property by fire communicated from property of another set on fire by defendant's negligence, where such spread of the fire is not the ordinary and natural result of defendant's negligence, but is dependent on accidental and varying circumstances.—*Lowery v. Manhattan Ry. Co.*, 40.

The burning of plaintiff's property by fire communicated from a building which had been set on fire by sparks allowed to fall upon it by negligence on defendants' part is not too remote from such negligence to permit a recovery therefor, if the burning of his property was a result naturally and reasonably to have been expected from the burning of such building, under the circumstances, and the result of the continued effect of the sparks falling on the building, without the aid of other causes not reasonably to have been expected.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 41.

Action maintainable for personal injuries to plaintiff from being run over in the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's

elevated railway.—*Lowery v. Manhattan Ry. Co.*, 33.

FIRE-ESCAPES.

Failure of owner of tenement-house to comply with statute requiring fire-escapes to be provided therefor is a breach of duty, for which he is liable to a tenant for damage thereby caused to the latter.—*Willy v. Mulledy*, 16.

FIRE-WORKS.

Keeping or manufacturing gunpowder or fireworks, being a lawful business, does not necessarily constitute a nuisance; whether it does depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.—*Heeg v. Licht*, 178.

FORCIBLE ENTRY AND DETAINER.

Proceeding under Ohio statute, being summary in its character, and capable of becoming, when prosecuted wrongfully, excessively annoying and harassing, is ground for action of malicious prosecution, if instituted and prosecuted maliciously and without probable cause.—*Pope v. Pollock*, 104.

FRAUD.

Action maintainable for fraud, coupled with damage.—*Upton v. Vail*, 31; *Hickey v. Morrell*, 262. Purchasing from debtor property subject to attachment, and aiding him to abscond, not ground of action for fraud by creditor having no lien or claim on such property.—*Lamb v. Stone*, 8.

An unreasonable delay in performance of an agreement to do a certain act may be intended to effect a scheme to gain an advantage by unlawful means and with fraudulent motives, and such acts may, therefore, sustain an action for a tort, such breach of contract being one of the elements constituting the tort.—*Rich v. New York Cent. & H. R. R. Co.*, 56.

Proof that a false representation was made with knowledge of its falsity, or without belief in its truth, or recklessly, without caring whether it be true or false, is sufficient proof of actual fraud, required by the English rule, to support an action for damages for deceit.—*Derry v. Peek*, 249.

But a false statement, made through carelessness and without reasonable ground for believing it to be true, although it may be evidence of fraud, does not, according to the English rule, necessarily constitute fraud; and such a statement, made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.—*Derry v. Peek*, 249.

Action maintainable, in Massachusetts, for damages for false representations by defendant, in stating, as of his own knowledge, material facts susceptible of knowledge, which were false, although he did not know them to be false; that he believed them to be true is no defense.—*Litchfield v. Hutchinson*, 257.

Action maintainable for false representations by defendant to plaintiff as to solvency of third person, whereby plaintiff was induced to give credit to the latter and lost his debt.—*Upton v. Vail*, 31.

Representations made to a father to induce him to purchase a gun for the use of his son, known by the vendor making them to be false, by which the son is induced to use the gun, operate as a distinct fraud on the son; and he may maintain an action against the vendor for injuries sustained in consequence thereof.—*Winterbottom v. Wright*, 64.

In an action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 255.

In an action of tort for an alleged fraud, one of the elements of which is a breach of a contract by an unreasonable delay in performance of the con-

tract obligation, proof of the contract, and of the delay in performance thereof, and of the reasons therefor, are essential links in the chain, and the relative situations of the parties and other circumstances which are elements of the transaction may be shown.—*Rich v. New York Cent. & H. R. R. Co.*, 56.

See *Deceit*.

FRAUDS, STATUTE OF.

Does not apply to oral representations as to solvency of another.—*Upton v. Vail*, 31.

FRAUDULENT PURCHASE.

Of property of debtor liable to attachment, not ground of action by creditor for damages for the fraud; the remedy being by suit to avoid the sale, or by attachment.—*Lamb v. Stone*, 8.

GAS.

Action maintainable for injuries from explosion of gas against defendants, by whom it was allowed to escape into plaintiff's premises, although the explosion was caused by negligence of a third person.—*Clark v. Chambers*, 35.

GRANT.

Presumed as ground for right by prescription.—*Thurston v. Hancock*, 25.

GUNPOWDER.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.—*Heeg v. Licht*, 175.

GUNS.

Pointing an unloaded gun at one who supposes it to be loaded, although within the distance it would carry if loaded, is not, without more, an assault punishable criminally, although it may sustain a civil action for damages.—*Chapman v. State*, 70.

Action maintainable for personal injuries caused by discharge of gun left loaded by defendant's negligence, although negligence of third person intervened as immediate cause of accident.—*Clark v. Chambers*, 33; *Thomas v. Winchester*, 67.

HIGHWAYS.

One unlawfully placing dangerous obstruction in public highway is liable for personal injuries thereby occasioned to a traveler, although the immediate cause of the accident was the intervening act of another.—*Clark v. Chambers*, 32.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose, are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, irrespective of the question of negligence.—*Congreve v. Smith*, 180.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.—*Congreve v. Smith*, 180.

Traveler driving on highway through the country among a sparse population, not bound to keep a constant lookout.—*Hartfield v. Roper*, 225.

A child two years old, permitted by his parents

to be in the beaten track of a highway with no one near him, cannot recover for injuries from being run over by the horses of a person driving thereon, unless the injuries were voluntarily inflicted by or were the result of gross carelessness of the traveler.—*Hartfield v. Roper*, 225.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse-Car R. Co.*, 231.

One driving too fast on the public highway is liable for running over a domestic animal therein, where his negligence was the immediate cause of the injury, although the injured animal was wrongfully and negligently left in the highway by his owner; the latter's negligence being only remote.—*Davies v. Mann*, 225.

Traveler on highway not liable for injury by collision to animal allowed by its owner to be in the highway unattended, where the collision happened from mere inadvertence on the part of the traveler, and there was equal or greater neglect on the side of the owner of the animal.—*Hartfield v. Roper*, 230.

Obstruction of highway an excuse for entry on adjoining land.—*Newkirk v. Sabler*, 151; *Campbell v. Race*, 160.

Obstruction of passage of a person in one direction only along a portion of a public highway, he being free to go in another direction, does not amount to an imprisonment for which he can maintain an action for false imprisonment.—*Bird v. Jones*, 82.

HOMICIDE.

Self-defense an excuse, where the person assailed had reason to believe that his assailant intended to do him great bodily harm, and that he was in danger of such harm, and that no other means could effectually prevent it.—*Commonwealth v. O'Malley*, 77.

HORSES.

One breaking a horse in a public place is liable in damages to another person hurt by the horse.—*Morain v. Devlin*, 50.

Action maintainable for injuries caused by plaintiff's horses taking fright at a stream of water allowed by defendants to spout up in the road.—*Clark v. Chambers*, 31.

Action maintainable for injuries caused by defendant's horse, left unattended in the street, although immediate cause of injury was the intervening act of a third person.—*Clark v. Chambers*, 33; *Thomas v. Winchester*, 67.

Action maintainable for personal injuries to plaintiff from being run over on the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's elevated railway.—*Lowery v. Manhattan Ry. Co.*, 38.

One who hires a horse to drive to a particular place, and drives beyond the place or in another direction, is liable for a conversion.—*Freeman v. Boland*, 200.

HUMAN LIFE.

No justification admissible where life of one person has been lost by negligence of another, whether by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 66.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 236.

HUSBAND AND WIFE.

Husband may recover for slander of wife, causing, as a natural consequence, injury to him by

loss of trade and custom in his business.—*Van Horn v. Van Horn*, 110.

Action maintainable by husband for loss of *consortium* with his wife, which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 216.

ICE.

Action not maintainable for injuries from slipping on ice formed in street, against one who allowed the water forming it to flow into the gutter without being aware of an obstruction to its passing into the sewer which caused it to spread into the street and become frozen.—*Clark v. Chambers*, 35.

IMPRISONMENT.

Includes, besides mere loss of freedom to go where one pleases, restraint within limits defined by an exterior will or power.—*Bird v. Jones*, 83.

Actual violence not necessary to constitute.—*Bird v. Jones*, 83, 85.

Municipal corporation cannot enforce obedience to its by-laws or ordinances by imprisonment, unless expressly authorized so to do by statute.—*Lynch v. Metropolitan El. Ry. Co.*, 87.

See *False Imprisonment*.

IMPUTED NEGLIGENCE.

Negligence of persons in charge of a public conveyance cannot be imputed to a passenger therein who is injured by the joint negligence of such persons and those in charge of another conveyance to defeat his action against the latter.—*Mills v. Armstrong*, (*The Bernina*), 235.

A child of tender years is chargeable with the negligence of the person having him in charge.—*Hartfield v. Roper*, 228. *Contra*, *Newman v. Phillipsburg Horse-Car R. Co.*, 231.

INDICTMENT.

Entry of *nolle prosequi* to indictment, by leave of court, on motion of the public prosecutor, made after consultation with and by request of the party on whose complaint the indictment was found, is a termination of the criminal charge which will sustain an action by the accused for malicious prosecution.—*Moulton v. Beecher*, 103.

INFANCY.

An infant may bring a suit at any age, but, if the suit depends upon a condition on his side, he must show that it was performed.—*Hartfield v. Roper*, 230.

A person seeing a small child on a railroad track in extreme peril from a rapidly approaching train owes to the child the duty to rescue it if he can do so without incurring great danger to himself, and the law will not impute negligence to an effort by him to rescue the child, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 236.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as to the offense.—*Sheehan v. Sturges*, 80.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

But even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

The conduct of a boy nearly 10 years old, of average intelligence, familiar in a general way with the working of a railroad turn-table, knowing that it was dangerous to play upon it, and that so doing was forbidden by the railroad company, and having been warned by his father not to go upon it, who nevertheless engages with other boys in swinging upon it while in motion, and is injured thereby, is such contributory negligence as will defeat a recovery for such injury, although he may not have been of sufficient age and discretion to understand the full extent of the danger.—*Twist v. Winona & St. P. R. Co.*, 226.

A child of tender years is chargeable with negligence of the person having him in charge.—*Hartfield v. Roper*, 228. *Contra*, *Newman v. Phillipsburg Horse-Car R. Co.*, 231.

A child two years old, permitted by his parents to be in the beaten track of the highway with no one near him, cannot recover for injuries from being run over by the horses of a person driving thereon, unless the injuries were voluntarily inflicted by or were the result of gross carelessness of the traveler.—*Hartfield v. Roper*, 228.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse-Car R. Co.*, 231.

Infant may recover for injuries from dangerous appliance adjoining a public way, although received while trespassing.—*Gramlich v. Wurst*, 8; *Clark v. Chambers*, 34.

Infant who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.—*Freeman v. Boland*, 200.

Infant liable personally for wrongs which he commits against the person and property of others.—*Hartfield v. Roper*, 230.

Action of trespass maintainable against an infant.—*Hartfield v. Roper*, 230.

Action of trover maintainable against an infant for mere non-feasance; *e. g.*, a non-delivery of goods, where they do not come into the infant's hands by contract.—*Hartfield v. Roper*, 230.

INJUNCTION.

May be granted to restrain repetition or continuance of injurious act which may become the foundation or evidence of an adverse right.—*Webb v. Portland Manuf'g Co.*, 19.

Writ of injunction not a matter of grace, but of right, in a proper case; and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.—*Campbell v. Seaman*, 164.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brick-kiln is such irreparable injury as a court of equity will enjoin.—*Campbell v. Seaman*, 164.

An injunction restraining the ringing of a factory bell, used to notify employes, before a certain hour in the morning, does not give a vested right which the legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.—*Sawyer v. Davis*, 186.

INNKEEPERS.

Cannot detain person of guest to secure payment of bill.—*Lynch v. Metropolitan El. Ry. Co.*, 87.

To say of a keeper of a house of public entertainment that he is a "dangerous man," a "desperate man," and that the speaker is "afraid to go in his house alone," is not ground for an action of slander, as affecting such person in his business, since the words do not relate to his business character, or charge any delinquency in his business.—*Ireland v. McGarvish*, 118.

INSANITY.

Not ground of exemption from liability for tort.—*Morain v. Devlin*, 50.
Lunatic liable personally for wrongs which he commits against the person and property of others.—*Hartfield v. Roper*, 230.
Defense to crime.—*Morain v. Devlin*, 51.
Publication in newspaper of statement imputing insanity to a teller in a bank, libelous *per se*, as tending to injure him in his employment.—*Moore v. Francis*, 126.

INSURANCE.

Insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, the loss thereby caused the company being too remote and indirect.—*Mobile Life Ins. Co. v. Brame*, 247.

INTENT.

Wrongful intent not necessary to constitute tort in cases of trespass.—*Bessey v. Olliot*, 49; *Weaver v. Ward*, 49; *Guille v. Swan*, 49; *Hobart v. Hagget*, 195; *Dexter v. Cole*, 195.

Nor in cases of conversion of personal property.—*Laverty v. Snethen*, 197.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Vandenburg v. Truax*, 37.

Wrongful intent necessary to constitute tort, in cases of fraud, malicious prosecution, etc.—*Guille v. Swan*, 50, note.

In an action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 255.

Present intention, as well as present ability, to use violence against the person of another, necessary to constitute criminal assault.—*Chapman v. State*, 70.

Words accompanying menacing acts and indicating that there is no intent to do actual violence may be considered on the question whether such acts constitute an assault.—*State v. Crow*, 72.

For a conviction of mayhem for an injury during a conflict, it is not necessary that the accused should have formed the intent before engaging in the conflict.—*Barholt v. Wright*, 74.

JOINT TENANCY AND TENANCY IN COMMON.

Trespass is maintainable by one tenant in common against another, upon an actual ouster.—*Murray v. Hall*, 157.

Sale and delivery, by one tenant in common of personal property, of the entire property as exclusively his own, is a conversion, for which his co-tenant can maintain trover.—*Weid v. Oliver*, 202.

JOINT TORT-FEASORS.

Personal privilege from civil action of one of two joint wrong-doers does not exempt the other from liability.—*Rice v. Coolidge*, 13.

No apportionment of damages between.—*Keegan v. Hayden*, 68.

No contribution between in respect of damages for an act which the party must be presumed to have known to be unlawful.—*Armstrong County v. Clarion County*, 68.

JUDGES.

Judges of courts of superior or general jurisdiction not liable to civil actions for their judicial

acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; although there is no such exemption where there is clearly no jurisdiction over the subject-matter, and such want of jurisdiction is known to the judge.—*Bradley v. Fisher*, 206.

Where a court has power to make an order striking the name of an attorney from the roll of attorneys practicing in the court, error in not citing the attorney, before making such an order, to show cause why it should not be made, however it may affect the validity of the act, does not make it any the less a judicial act, nor does it render the judge making the order liable in damages to the attorney, as though the court had proceeded without jurisdiction.—*Bradley v. Fisher*, 206.

Judge not liable to action for false imprisonment for awarding a *capias* upon affidavits which do not disclose a sufficient cause for arrest.—*Fischer v. Langbein*, 92.

JUDGMENT.

Where interest, not given by the verdict, is inserted in the judgment, without authority, the proper remedy is by motion to correct the judgment and not by appeal.—*Leonard v. Columbia Steam Nav. Co.*, 265.

Any person not a party to a former action and not in privity with a party may, in a collateral action, impeach the judgment.—*Rice v. Coolidge*, 15.

JURISDICTION.

Power of court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a substantial cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.—*Fischer v. Langbein*, 90.

Order or process based on a decision of the court, involving the exercise of the judicial function, although afterwards set aside as erroneous, is not void, and does not subject the party procuring it to an action for damages thereby inflicted.—*Fischer v. Langbein*, 90.

Public officer not liable to civil action for a judicial determination, however erroneous or malicious, if he had jurisdiction of the case, and was authorized to determine it.—*Bradley v. Fisher*, 206; *Weaver v. Devendorf*, 211.

JUSTIFICATION.

Self-defense a justification of assault and battery.—*Scribner v. Beach*, 75; *Commonwealth v. O'Malley*, 77; *Commonwealth v. Donahue*, 77.

In civil actions for libel, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives, and for justifiable ends.—*Castle v. Houston*, 132.

The truth of the charge that a man had the venereal disease is a justification, in an action for slander by speaking words imputing such charge.—*Golderman v. Stearns*, 116.

The truth of the charge, for making which an action of slander is brought, not admissible in justification, under the general issue.—*Van Ankin v. Westfall*, 114.

The speaking of defamatory words is justified by a privileged occasion therefor, although the communication was made voluntarily, if it was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty to make it.—*Fresh v. Cutter*, 138.

KNOWLEDGE.

To support an action of deceit for making a false representation, knowledge by defendant of its falsity is not always necessary.—*Derry v. Peek*, 249; *Litchfield v. Hutchinson*, 257.

LACHES.

May be a bar to equitable relief against nuisance.—*Campbell v. Seaman*, 164.

LANDLORD AND TENANT.

Owner of building letting rooms in it, with right to tenant to go upon roof of extension to dry clothes, not liable for injuries to visitor of tenant received by falling from window of latter's rooms through unprotected sky-light in roof of extension.—*Miller v. Woodhead*, 4.

Failure of owner of tenement-house to comply with statute requiring fire-escapes to be provided therefor is a breach of duty for which he is liable to a tenant for damages thereby caused to the latter.—*Willy v. Mulledy*, 16.

Owner of premises having so constructed a cess-pool thereon that the offensive matter deposited in it by his tenants necessarily percolates through to the adjoining premises is liable equally with the tenants for the injury to the adjoining occupant.—*Fow v. Roberts*, 181.

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.—*McDonough v. Gilman*, 182.

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.—*McDonough v. Gilman*, 182.

The notice to a tenant, to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.—*McDonough v. Gilman*, 182.

The owner of personal property leased to another cannot maintain trover for a conversion pending the demise.—*Gordon v. Harper*, 201.

LANDMARK.

Removal, when made a statutory offense, involves moral turpitude.—*Young v. Miller*, 111.

LATERAL SUPPORT.

Owner of land injured by removal of lateral support by adjoining owner may recover from him for loss of or injury to the soil, but not for injury to house built thereon, where no right has been acquired by prescription.—*Thurston v. Hancock*, 23; *Smith v. Thackerah*, 30.

Lease.

See *Landlord and Tenant*.

LEGAL RIGHTS.

Violation necessary to constitute tort.—*Guest v. Reynolds*, 1; *Miller v. Woodhead*, 4; *Gramlich v. Wurst*, 5; *Rich v. New York Cent. & H. R. R. Co.*, 60.

No right of action for negligence unless there is a violation of legal duty.—*Larmore v. Crown Point Iron Co.*, 219.

Violation of moral right or duty does not constitute tort.—*Guest v. Reynolds*, 1; *Miller v. Woodhead*, 4; *Gramlich v. Wurst*, 5.

May be established by common law, in cases of novel impression.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 11; *Rice v. Coolidge*, 13.

Action maintainable for violation of legal rights created by statute.—*Willy v. Mulledy*, 16.

Lex Loci.

See *Conflict of Laws*.

LIBEL.

Action may be maintainable for publishing defamatory words by writing or printing, although they would not have been actionable if spoken merely.—*Tillson v. Robbins*, 124; *Moore v. Francis*, 127.

Action maintainable for the publication, by writing or printing, of a charge such as, if believed, would naturally tend to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, without allegations of special damage, or of any fact to make such publication import a charge of crime.—*Tillson v. Robbins*, 124.

Publication in a newspaper of a statement imputing insanity to a teller in a bank, libelous *per se*, as tending to injure him in his employment.—*Moore v. Francis*, 126.

Action not maintainable for a publication in a newspaper of a notice to the public that a saloon-keeper, to get rid of a just claim in court, set up as a defense an existing prohibitory liquor law, under which no action for the price of liquors sold in violation of the provisions thereof could be maintained.—*Homer v. Engelhardt*, 128.

Where a letter, containing defamatory matter, is dictated by the author to a clerk, who takes it down in short-hand, and then writes it out in full by means of a type-writing machine, and the letter thus written is copied by another clerk in a copying-press, there is a publication of the letter to both; and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 131.

And where such letter, addressed to a firm, is sent by the author in an envelope addressed to the firm, and is opened by a clerk of the firm, in the ordinary course of business, and read by other clerks of the firm, there is a publication of the letter to such clerks; and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 131.

It is not a legal excuse that defamatory matter was published accidentally or inadvertently or with good motives, and in an honest belief in its truth.—*Moore v. Francis*, 128.

In civil actions, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives, and for justifiable ends.—*Castle v. Houston*, 132.

The rule is not changed by the provision of the constitution of Kansas (Bill of Rights, § 11) that, "in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted;" as the requirement of proof that the matter was published for justifiable ends, in order that "the accused party shall be acquitted," was limited to criminal prosecutions.—*Id.*

As to libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action, the privilege is absolute, however malicious the intent, or however false the charge may have been.—*Moore v. Manufacturers' Nat. Bank*, 145.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.—*Moore v. Manufacturers' Nat. Bank*, 145.

Confidential advice or communication to persons asking therefor, or having a right to expect it, not ground for action of libel unless malice in fact be shown.—*Bromage v. Prosser*, 129.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of

anything known to the writer concerning any young man the person addressed "went with," or any young man in the place.—*Byam v. Collins*, 139.

Information given to the governor of the state for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged, but if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.—*Woods v. Wiman*, 144.

Proprietors of a mercantile agency, whose business is collecting and communicating to subscribers information as to the character, credit, and pecuniary responsibility of merchants, are liable for a false and injurious report of the failure of certain merchants, published and circulated among all the subscribers; as such a communication is privileged only when made in good faith, to one having an interest in the information.—*Sunderlin v. Bradstreet*, 142.

That such libelous statement was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 142.

Whether a libelous communication is privileged is a matter of law.—*Byam v. Collins*, 139.

In a civil action for libel in the state of New York, where the publication is admitted, and the words are unambiguous, the question of libel or no libel is one of law, which the court must decide.—*Moore v. Francis*, 126.

Query, whether lunatic is liable for libel.—*Morain v. Devlin*, 51, note.

See *Stunder*.

LICENSE.

If the owner of land sells chattels thereon, the vendee thereby obtains an implied license to enter on the premises and remove the property; and such license is not revocable.—*Newkirk v. Sabler*, 151; *Giles v. Simonds*, 157.

A verbal contract by the owner of land for the sale of trees standing thereon, to be cut and removed by the purchaser, gives the latter an implied license to enter for that purpose; but such license is revocable at any time, except as to an entry for the purpose of removing trees cut before the revocation.—*Giles v. Simonds*, 157.

Legal license conferred by process to enter house for purpose of service on person within the house.—*Hager v. Danforth*, 81.

The abuse of a license to enter premises given by law makes the party a trespasser *ab initio*; but otherwise where the license to enter was by the person in possession.—*Six Carpenters' Case*, 155.

By landlord to tenant to go upon roof adjoining demised premises for purpose of drying clothes, does not extend to visitor to tenant not using the roof for such purpose.—*Miller v. Woodhead*, 4.

Duty of keeping premises in a safe condition, even as to a mere licensee, may arise where affirmative negligence in the management of the property or business of the owner would be likely to subject the licensee to great danger.—*Larmore v. Crown Point Iron Co.*, 220.

LIEN.

Action maintainable for tortious acts by which lien of creditor on property of debtor is destroyed or defeated.—*Lamb v. Stone*, 10, 11.

LIGHT AND AIR.

Not subjects of property beyond moment of actual occupancy.—*Guest v. Reynolds*, 1.

Obstruction of access by owner of adjoining land not ground of action unless adverse right thereto has been acquired.—*Guest v. Reynolds*, 1; *Thurstont v. Hancock*, 24.

English doctrine of prescription for easement of light and air not applicable in Illinois.—*Guest v. Reynolds*, 3.

LOANS.

Action of trespass maintainable by owner of personal property loaned to another for destruction of it by third person, while in possession of borrower.—*White v. Brantley*, 194.

One who, having no knowledge of the ownership of property, borrows it of a person having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, is not liable for a conversion, in an action by the true owner.—*Frome v. Dennis*, 199.

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.—*Frome v. Dennis*, 199.

Borrower of a carriage who, having received it from a livery stable where it was stored for the lender, returns it to such livery stable after the keeper of the stable has ceased to be the agent of the lender, is liable to the latter for a conversion.—*Esmay v. Fanning*, 203.

Lunatics.

See *Insanity*.

MACHINERY.

Leaving a dangerous machine in a public place without precaution against mischief constitutes negligence, although the imprudent and unauthorized act of another may be necessary to realize such mischief.—*Clark v. Chambers*, 36.

MALICE.

Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse.—*Pullen v. Glidden*, 99.

Malice in fact, in a legal sense, denotes any unlawful act done willfully and purposely, to the prejudice and injury of another; it does not necessarily involve malevolence or ill will towards the plaintiff.—*Pullen v. Glidden*, 99.

Malice, in common acceptance, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.—*Bromage v. Prosser*, 129.

Gravamen of action for combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages, is the malice, not the conspiracy.—*Van Horn v. Van Horn*, 109.

Malice in law is inferred, ordinarily, from the speaking of slanderous words, wrongfully and intentionally; but where, on account of the cause of speaking, it is *prima facie* excusable, malice in fact must be proved by plaintiff.—*Bromage v. Prosser*, 128.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.—*Byam v. Collins*, 139.

Actual malice makes defamatory words actionable, although spoken on a privileged occasion.—*Fresh v. Cutter*, 137.

Malice not necessary to sustain action for untrue statement disparaging goods of another, made without lawful occasion, and causing him special damage.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 13.

A person who maliciously induces another to break a contract made by the latter with an employer for his exclusive personal services, where such breach would naturally cause, and does, in fact, cause, injury to the employer, is liable to the employer therefor.—*Bowen v. Hall*, 46. See *Van Horn v. Van Horn*, 109.

MALICIOUS PROSECUTION.

The essential elements of an action for malicious prosecution consist of a previous unfounded prosecution of the plaintiff by the defendant, com-

menced without probable cause, conducted with malice, and terminating favorably to the party prosecuted.—*Miller v. Milligan*, 98.

Where plaintiff fails to show that defendant was the real prosecutor in the former suit, or, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, the complaint may properly be dismissed.—*Miller v. Milligan*, 98.

That the warrant upon which an arrest was made was void on its face is not available to the party arrested in an action for malicious prosecution, but only in an action for false imprisonment.—*Gelzenleuchter v. Niemeyer*, 90.

The distinction between false imprisonment and malicious prosecution is that an imprisonment under legal process, in an action commenced and carried on maliciously and without probable cause, is malicious prosecution; and that false imprisonment is a trespass committed against a person by unlawfully arresting and imprisoning him without any legal authority.—*Gelzenleuchter v. Niemeyer*, 90.

To sustain an action for malicious prosecution, malice in fact must be shown, as distinguished from malice in law, which is established by legal presumption from proof of certain facts.—*Pullen v. Glidden*, 99.

But plaintiff is not required to prove "express malice," in the popular signification of the term; as, that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards plaintiff; it is sufficient that he prove malice in the legal sense, in which an act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.—*Pullen v. Glidden*, 99.

Plaintiff must prove, not only express malice on the part of defendant, but absence of probable cause for the prosecution.—*Foshay v. Ferguson*, 100.

Want of probable cause for the former suit and malice must concur, and the former cannot be inferred from any degree of malice which may be shown.—*Miller v. Milligan*, 98.

One causing the arrest of an innocent person on a criminal charge is not exempted from liability therefor by a groundless suspicion, unwarranted by the conduct of the accused or by facts known to the accuser when the accusation was made.—*Carl v. Ayers*, 94.

If defendant, in an action for malicious prosecution, had, at the time he made the criminal charge against plaintiff for which the latter brings the action, sufficient grounds for believing that plaintiff was guilty of the offense charged, such probable cause is a defense to the action, although the defendant may previously have agreed with plaintiff not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards plaintiff.—*Foshay v. Ferguson*, 100.

Action maintainable for prosecution of civil action maliciously and without probable cause; at least, where there has been deprivation of liberty or taking of property.—*Cardinal v. Smith*, 102; *Pope v. Pollock*, 104; *Bump v. Betts*, 107.

Action maintainable for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer, under the Ohio statute, that proceeding being summary in its character, and capable of becoming, when wrongfully prosecuted, excessively annoying and harassing.—*Pope v. Pollock*, 104.

Where a proceeding by attachment against property is brought in the absence of the defendant therein, and he has no opportunity to defend, a termination of the proceeding in his favor need not be shown to sustain an action by him for malicious prosecution thereof; a judgment against him, under such circumstances, is not conclusive evidence of probable cause or want of malice, as in cases of personal service of process.—*Bump v. Betts*, 107.

Failure of plaintiff in civil action, after procuring arrest of defendant on the writ therein, to have the writ returned, or to appear at the court to which it is returnable, is a final determination of the action, such that the defendant may main-

tain an action for malicious prosecution.—*Cardinal v. Smith*, 102.

Entry of *nolle prosequi* to an indictment, by leave of court, on motion of the public prosecutor, made after consultation with and by the request of the party on whose complaint the indictment was found, is such a termination of the criminal charge as will sustain an action by the accused for malicious prosecution.—*Moulton v. Beecher*, 103.

Proof that defendant in an action for malicious prosecution submitted all the facts of the case which he knew were capable of proof fairly to his counsel, and acted *bona fide* on the advice given, negatives, if not the malice, the want of probable cause, even though the facts did not warrant the advice and the prosecution.—*Walter v. Sample*, 101.

Action for malicious abuse of process in order illegally to compel a party to give up his property may be sustained without showing that the previous action, in which the process was improperly employed, has been determined, or that the process was sued out without reasonable or probable cause.—*Grainger v. Hill*, 107.

MARRIAGE.

Action maintainable for words spoken of plaintiff by defendant, whereby a contract of marriage between plaintiff and another person was broken off by the latter, although such words are not in themselves actionable, and although plaintiff has a remedy against such other person for breach of the contract.—*Moody v. Baker*, 44.

See *Husband and Wife*.

MASTER AND SERVANT.

Employer required to exercise reasonable care in providing safe machinery and appliances for the use of his servant.—*Larmore v. Crown Point Iron Co.*, 220; *Pantzar v. Tilly Foster Min. Co.*, 242.

Master cannot delegate the performance of these duties to a superintendent or other employe, so as to exonerate himself from liability to a servant who has been injured by their non-performance.—*Pantzar v. Tilly Foster Min. Co.*, 242.

The rule that the servant takes the risk of the service presupposes that the master has performed the duties of care, caution, and vigilance which the law casts upon him.—*Pantzar v. Tilly Foster Min. Co.*, 242.

One employed by a mining company in constructing a wall in its mine, who is ignorant of the unsafe condition of an overhanging rock, and whose duties do not call him to any place from which its condition could be observed, is not censurable for an omission to observe the danger in time to avoid it; but the company, having notice of the danger, and failing to adopt proper means of protection, is liable for an injury to the employe from the fall of the rock.—*Pantzar v. Tilly Foster Min. Co.*, 242.

A person in the employ of another, charged with specific duties, does not, while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.—*Muller v. McKesson*, 191.

The act of a workman on a railroad in riding on the pilot of an engine instead of in the car provided for workmen, although he was informed of the danger of doing so, is negligence on his part, contributing to his injury by a collision of the engine with cars standing on the track, sufficient to defeat a recovery by him against the railroad company therefor.—*Baltimore & P. R. Co. v. Jones*, 223.

Master not liable to servant for injury caused by negligence of fellow-servant, where, although the immediate objects on which the two servants are employed are very dissimilar, yet the risk of negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages.—*Morgan v. Vale of Neath Ry. Co.*, 244.

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.—*Morgan v. Vale of Neath Ry. Co.*, 244.

A carpenter, employed by a railway company to do any carpenter's work for its general purposes, and who, while standing on a scaffolding at work on a shed close to the line of the railway, is thrown down and injured by negligence of porters in the service of the company in shifting an engine on a turn-table so that it strikes a ladder supporting the scaffold, cannot recover damages therefor from the company.—*Morgan v. Vale of Neath Ry. Co.*, 244.

Action maintainable by master against one who entices away his servant, although he has a remedy against the servant upon the contract of employment.—*Moody v. Baker*, 45.

Action maintainable by the employer in a contract for the exclusive personal services of the employee against a third person, who maliciously induces the employee to break the contract, where such breach causes, as a natural and probable consequence, injury to the employer, although the relation between the parties to the contract may not be strictly that of master and servant.—*Bowen v. Hall*, 46.

A master is responsible *civilliter* for the wrongful act of his servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, if it was done by the servant while acting for the master, and within the scope of the business intrusted to him.—*Rounds v. Delaware, L. & W. R. Co.*, 237.

The master is liable for a conversion by his apprentice of property taken by the latter in the line of his employment.—*Armory v. Delamirie*, 201.

A servant, having received a chattel from his master, is not bound to give it up to another claiming it as owner, without first consulting the master; but if, after having had an opportunity to confer with his master, he relies on his master's title, and absolutely refuses to comply with the demand, he will be liable for a conversion.—*Singer Manuf'g Co. v. King*, 205.

A railroad company, having instructed its gatekeepers not to let passengers pass from its trains to the street until they should pay their fares or show tickets therefor, is liable for false imprisonment by a gate-keeper of a passenger who had lost his ticket.—*Lynch v. Metropolitan El. Ry. Co.*, 86.

Master who authorizes servant to use force against another, when necessary in executing the master's orders, liable for the use of an unnecessary degree of force by the servant, through his misjudgment or violence of temper, giving a right of action to another.—*Rounds v. Delaware, L. & W. R. Co.*, 237.

Master not liable for injury by his servant to another, done under guise and cover of executing the master's orders, but willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes.—*Rounds v. Delaware, L. & W. R. Co.*, 237.

One person is not liable for an injury caused by the negligence of another merely because the latter was acting under an employment by him, unless such employment created the relation of master and servant between them.—*Hexamer v. Webb*, 240.

Where a mechanic is employed by the owner of a building to do work thereon, according to his own judgment as to what is necessary to be done to accomplish the object intended, the mode in which it was to be done and the means to be employed being left entirely to him, and no price being fixed, the work being charged for by the day, he is an independent contractor, and the owner is not liable for injuries to a third person from the negligent construction of a scaffold used in the work.—*Hexamer v. Webb*, 240.

Giving character of servant a privileged communication, for which action of slander or libel will not lie, unless malice in fact be shown.—*Bromage v. Prosser*, 129; *Fresh v. Cutter*, 136.

MAXIMS.

Acta exteriora indicant interiora secreta.—*Six Carpenters' Case*, 155.

Actus non facit reum nisi mens sit rea.—*Bessey v. Olliot*, 49.

Aqua currit, et debet currere, ut currere solebat.—*Webb v. Portland Manuf'g Co.*, 23; *Barkley v. Wilcox*, 171; *Clinton v. Meyers*, 173-175; *Merrifield v. Lombard*, 176.

Caveat emptor.—*Grigsby v. Stapleton*, 259.

Cessante ratione cessat ipsa lex.—*Campbell v. Race*, 161.

Ex damno sine injuria non oritur actio.—*Thurston v. Hancock*, 23; *Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 26.

Nemo ex consilio obligatur.—*Upton v. Vail*, 31.

Sic utere tuo ut alienum non laedas.—*Thurston v. Hancock*, 23; *Campbell v. Seaman*, 164; *Heeg v. Licht*, 179.

The greater the truth, the greater the libel.—*Castle v. Houston*, 133.

Ubi jus ibi remedium.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 13.

Volenti non fit injuria.—*Barholt v. Wright*, 74; *Hartfield v. Roper*, 230.

MAYHEM.

For a conviction of mayhem for an injury during a conflict, it is not necessary that the accused should have formed the intent before engaging in the conflict.—*Barholt v. Wright*, 74.

MERCANTILE AGENCY.

A communication, by proprietors of a mercantile agency, to their subscribers, of a report of the failure of certain merchants, is privileged only when made in good faith, to those having an interest in the information.—*Sunderlin v. Bradstreet*, 142.

MISTAKE.

Not an excuse for trespass.—*Hobart v. Haggett*, 195; *Dexter v. Cole*, 195.

Nor for conversion of personal property.—*Esmay v. Fanning*, 203.

MITIGATION.

The fact that the injuries complained of were inflicted in a fight engaged in by the parties by mutual consent is ground for mitigation of damages.—*Barholt v. Wright*, 74.

Evidence of the truth of the charge for making which an action of slander is brought is not admissible in mitigation of damages.—*Van Ankin v. Westfall*, 113.

Payment of proceeds of sheriff's sale of goods under an invalid levy not available to him in mitigation of damages therefor, being but a continuation and aggravation of the original trespass.—*Welsh v. Wilson*, 215.

MORAL DUTY.

Violation does not constitute a tort, unless a legal right or duty is violated.—*Lamb v. Stone*, 8.

Ground of privilege for making a defamatory communication.—*Byam v. Collins*, 139.

MUNICIPAL CORPORATIONS.

Cannot enforce obedience to by-laws or ordinances by imprisonment, unless expressly authorized to do so by statute.—*Lynch v. Metropolitan El. Ry. Co.*, 87.

Where the duty is imposed by law upon a city to keep its sewers in repair, an omission to make the examination necessary to guard against an obstruction or dilapidation of the sewer, which is an

ordinary result of its use, and might have been discovered on inspection, is a neglect of duty which renders the city liable for damages thereby caused, although none of its officials had notice that the sewer was obstructed or out of repair.—*McCarthy v. City of Syracuse*, 212.

NECESSITY.

Excuse for entry on land of another.—*Newkirk v. Sabler*, 151; *Proctor v. Adams*, 159; *Campbell v. Race*, 160.

NEGLIGENCE.

No right of action for negligence unless there is a violation of legal duty.—*Larmore v. Crown Point Iron Co.*, 219.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable for injuries to trespasser falling into excavation.—*Gramlich v. Wurst*, 5.

Leaving a dangerous machine in a public place without precaution against mischief constitutes negligence.—*Clark v. Chambers*, 36.

A person who goes upon the land of another without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, though he can show that the owner might have ascertained the defect by the exercise of reasonable care, for as to such person there is no violation of a legal duty.—*Larmore v. Crown Point Iron Co.*, 219.

Owner of dangerous machinery, who leaves it in an open place on his own land, not liable for negligence because he fails to take active measures to insure the safety of an intruder,—at least as to one of sufficient mental capacity to be a conscious trespasser.—*Twist v. Winona & St. P. R. Co.*, 226.

Failure of owner of tenement-house to comply with statute requiring fire-escapes to be provided therefor is a breach of duty, for which he is liable to a tenant for damage thereby caused to the latter.—*Willy v. Mulledy*, 16.

Owner of building, letting rooms in it with right to tenant to go upon roof of extension to dry clothes, not liable for injuries to visitor of tenant received by falling from window of latter's rooms through unprotected sky-light in roof of extension.—*Miller v. Woodhead*, 4.

As a general principle, blame must be imputable as a ground of responsibility for damage proceeding from a lawful act.—*Marshall v. Welwood*, 221.

A person is not in law, as a general rule, answerable for the natural consequences of his acts, where such acts are lawful in themselves, and are done with proper care and skill.—*Marshall v. Welwood*, 221.

Exceptional safeguards not required where there are no exceptional hazards.—*Gramlich v. Wurst*, 5.

An owner is not liable for injuries caused by the explosion of a steam-boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.—*Marshall v. Welwood*, 221.

It is not enough, in order to make one person liable for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them.—*Hexamer v. Webb*, 240.

Person guilty of act of negligence, imminently dangerous to lives of others, is liable to one injured thereby, whether there be a contract between them or not; if the act was not so, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.—*Thomas v. Winchester*, 67.

No justification admissible where life of one person has been lost by negligence of another, whether

by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 66.

Lunatic liable for negligence in permitting tenement-house to be in defective condition.—*Morain v. Devin*, 50.

Action for personal injuries from dangerous obstruction in the highway maintainable against person who unlawfully placed it there, although the immediate cause of the injury was the intervening act of another.—*Clark v. Chambers*, 32.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.—*Baltimore & P. R. Co. v. Jones*, 223.

Negligence of a plaintiff, exposing his property to injury, will not preclude his recovery of damages from a person whose subsequent negligence actually causes injury to the property, if the latter's negligence is the proximate cause of such injury.—*Davies v. Mann*, 225.

Owner of tenement-house, who has failed to provide fire-escapes therefor, as required by statute, is not relieved from liability for damage thereby caused to a tenant, by the fact that the tenant had occupied the premises for a few days previous to the fire causing the damage.—*Willy v. Mulledy*, 16.

Action not maintainable for injury to plaintiff from a blow by negligence of defendant, if plaintiff was also chargeable with negligence contributing as an efficient cause to the injury.—*Brown v. Kendall*, 51.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, though selected by him, and subject to his orders.—*Keenan v. Southworth*, 214.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 236.

Doctrine of contributory negligence does not apply to cases of commission of intentional wrong.—*Barholt v. Wright*, 74.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

But even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 226.

A child of tender years is chargeable with negligence of the person having him in charge.—*Hartfield v. Roper*, 225. *Contra*, *Newman v. Phillipsburg Horse-Car R. Co.*, 231.

A child two years old, permitted by his parents to be in the beaten track of the highway with no one near him, cannot recover for injuries from being run over by the horses of a person driving thereon, unless the injuries were voluntarily inflicted by or were the result of gross carelessness of the traveler.—*Hartfield v. Roper*, 225.

A child two years of age who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse-Car R. Co.*, 231.

The negligence of the person in charge of a public conveyance cannot be imputed to a passenger therein who is injured by the joint negligence of such persons, and those in charge of another conveyance, to defeat his action against the latter. *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Railroad Co.*, L. R. 10 Exch. 47, overruled.—*Mills v. Armstrong*, 233, (*The Bernina*) Id.

In an action for a personal injury to plaintiff by a blow inflicted unintentionally by defendant while doing a lawful act, the burden is on plaintiff to show that defendant is chargeable with some fault,

negligence, carelessness, or want of prudence.—*Brown v. Kendall*, 53.

What constitutes ordinary care varies with circumstances.—*Brown v. Kendall*, 52.

Negligence is a question for the court, where there is no conflict of testimony, and the standards by which human conduct is to be governed in cases of like impression with that before the court have been judicially defined.—*Gramlich v. Wurst*, 7.

It is a question for the jury, where measure of duty is ordinary and reasonable care, and standard of degree of care shifts with circumstances, or where essential facts are controverted.—*Gramlich v. Wurst*, 7.

NEGOTIABLE INSTRUMENTS.

One to whom a promissory note is delivered by the payee to be negotiated, with instructions not to part with the possession of it without receiving the money, and who delivers the note to a third person under the promise of the latter to get it discounted and return the proceeds, is liable to the payee, as for a conversion of the note, for the loss by the appropriation of the proceeds of the note by such third person.—*Laverty v. Sneten*, 197.

NOISE.

The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to, which is to be determined, in connection with the importance of the business, by the effect of noise upon people generally.—*Rogers v. Elliott*, 177.

A use of property which is objectionable solely on account of the noise which it makes is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing.—*Rogers v. Elliott*, 176.

Ring the bell of a church, built upon a public street in a thickly-settled part of a town, in such manner as to materially affect the health or comfort of all in the vicinity, whether residing or passing there, constitutes a public nuisance.—*Rogers v. Elliott*, 177.

NOMINAL DAMAGES.

Recoverable for wanton and unnecessary injury to land in the use of an easement therein, although no particular amount of damages is proved.—*Dixon v. Clow*, 18; *Webb v. Portland Manuf'g Co.*, 19.

NOTICE.

Notice or request to remove a nuisance must be given to occupant of premises on which it exists, before an entry thereon by another to abate it, if it is merely continued by such occupant as alienee of the premises, and he was not himself the wrongdoer by having created the nuisance or neglected to perform some obligation by the breach of which it was created.—*Jones v. Williams*, 189.

NOXIOUS VAPORS.

An injury to property by noxious vapors arising on the land of another, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; and, in determining that question, the time, locality, and all the circumstances should be taken into consideration.—*St. Helen's Smelting Co. v. Tipping*, 168.

An action for such an injury may be maintained, although the business by the operation of which it is caused is a necessary trade, and the place is a suitable place for such a trade, and it is carried on in a reasonable manner.—*St. Helen's Smelting Co. v. Tipping*, 168.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brick-

kiln is such irreparable injury as a court of equity will enjoin.—*Campbell v. Seaman*, 164.

Annoyance caused by, not ground of action unless damage of appreciable amount is shown.—*Smith v. Thackerah*, 30.

NUISANCE.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.—*Campbell v. Seaman*, 164.

Annoyance to habitation or estate may constitute a nuisance.—*Guest v. Reynolds*, 2.

Obstruction of view or light does not constitute a nuisance.—*Guest v. Reynolds*, 3.

The burning of brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brick-burning is a useful and necessary industry.—*Campbell v. Seaman*, 164.

An injury to property by noxious vapors arising on the land of another, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; and, in determining that question, the time, locality, and all the circumstances should be taken into consideration.—*St. Helen's Smelting Co. v. Tipping*, 168.

An action for such an injury may be maintained, although the business by the operation of which it is caused is a necessary trade, and the place is a suitable place for such a trade, and it is carried on in a reasonable manner.—*St. Helen's Smelting Co. v. Tipping*, 168.

The pollution of a stream of water so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied is an infringement of the rights of other riparian owners, and creates a nuisance which will be enjoined at the suit of those injured.—*Merrifield v. Lombard*, 175.

A use of property which is objectionable solely on account of the noise which it makes is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing.—*Rogers v. Elliott*, 176.

The right to make a noise for a proper purpose must be measured, in reference to the degree of annoyance which others may reasonably be required to submit to, which is to be determined, in connection with the importance of the business, by the effect of noise upon people generally.—*Rogers v. Elliott*, 177.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.—*Heeg v. Licht*, 178.

A dog accustomed to bite persons is a public nuisance, and may be killed by any one when found running at large.—*Muller v. McKesson*, 191.

A scaffold suspended from the roof of a building, for the purpose of making repairs thereto, not over the line of the sidewalk, is not within the meaning of a city ordinance forbidding the hanging of any goods, wares, and merchandise, or any other thing, in front of any building.—*Hexamer v. Webb*, 240.

A scaffold, constructed by suspending a ladder from the roof of a building, for the purpose of making improvements thereon, the building being 15 feet from the line of the sidewalk, is not *per se* a nuisance.—*Hexamer v. Webb*, 240.

An act of the legislature, which directs or allows that to be done which would otherwise be a nuisance, is valid, unless it can fairly be said to be an unwholesome and unreasonable law.—*Sawyer v. Davis*, 186.

Legislature may authorize use of bells, whistles, etc., by employers for purpose of giving notice to their workmen, under regulation of municipal authorities, although thereby injury is caused to individuals, such as a court of equity would restrain.—*Sawyer v. Davis*, 186.

A statute which authorizes a thing to be done which can be done without creating a nuisance will not be deemed to authorize a nuisance.—*Sawyer v. Davis*, 186.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription.—*Campbell v. Seaman*, 164.

If the right invaded or impaired by an alleged nuisance is a common and public one, a mere deprivation or obstruction of the use, which excludes or hinders all persons alike, and does not cause any special or peculiar damage to any one, furnishes no valid cause of action to an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance.—*Wesson v. Washburn Iron Co.*, 184.

But an alleged nuisance which injures private property, or the health or comfort of an individual, is in its nature special and peculiar, and is actionable, though it is committed in a manner and under circumstances which would render the guilty party liable to an indictment for a common nuisance.—*Wesson v. Washburn Iron Co.*, 184.

A person may recover for injuries to his premises caused by noise, smoke, and noxious vapors in the operation of another's rolling-mills, though many other persons in the same neighborhood are injured in the same way.—*Wesson v. Washburn Iron Co.*, 184.

A person who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly-populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.—*Rogers v. Elliott*, 176.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose, are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, irrespective of the question of negligence.—*Congreve v. Smith*, 180.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.—*Congreve v. Smith*, 180.

The landlord or grantor who has created a nuisance is himself liable, notwithstanding his lease or grant, for the continuance of the nuisance by his lessee or grantee.—*McDonough v. Gilman*, 182.

Action for nuisance does not lie against a grantee of the premises, unless, after request made to abate it, he does not remove the nuisance.—*McDonough v. Gilman*, 183.

Where a cess-pool is so constructed by the owner of the premises that the offensive matter deposited therein by his tenants necessarily percolates through to the adjoining premises, the owner is equally liable with the tenants for the injury to the adjoining occupant.—*Fow v. Roberts*, 181.

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.—*McDonough v. Gilman*, 182.

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.—*McDonough v. Gilman*, 182.

The notice to a tenant to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.—*McDonough v. Gilman*, 182.

Entry on land of another to abate a nuisance thereon, without previous request or notice to the

occupant to remove it, not justifiable in the case of a nuisance merely continued by such occupant as alienee of the premises, where he was not himself the wrong-doer by having created the nuisance or neglected to perform some obligation by the breach of which it was created.—*Jones v. Williams*, 189.

He who undertakes to abate a nuisance proceeds at his peril, taking the risk of being able to show that the thing complained of was in fact a nuisance; if he errs in judgment, he is answerable in damages; if a breach of the peace is involved, he is liable to indictment.—*Crosland v. Borough of Pottsville*, 190.

Where a person entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess; and, if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits.—*Crosland v. Borough of Pottsville*, 190.

The writ of injunction is not a matter of grace, but of right, in a proper case, and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.—*Campbell v. Seaman*, 164.

Acts of an upper riparian proprietor, in so conducting his business as to permit poisonous and corrosive substances to run into the stream by which the machinery of a lower proprietor is corroded and destroyed, will be restrained, as tending to create a nuisance of a continuous character.—*Merrifield v. Lombard*, 175.

OBSTRUCTING PROCESS.

Officer justified in using force necessary to overcome unlawful resistance to process.—*Hager v. Danforth*, 81.

OCCUPYING CLAIMANTS.

Occupant of land under color of title making in good faith valuable improvements thereon, and having by statute a right to compensation for his improvements if he should be judicially found not to be the rightful owner thereof, may recover for willful or negligent destruction of his improvements notwithstanding proof that title to land is in another.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 41.

OFFENSIVE TRADES.

Offensive odors ground of action for nuisance.—*Guest v. Reynolds*, 2.

Carrying on a business, although a lawful trade, which of itself produces inconvenience and injury to others, as being offensive to the senses and rendering the enjoyment of life and property uncomfortable, may constitute a nuisance; it is not necessary that it should endanger the health of the neighborhood.—*Heeg v. Licht*, 178.

See *Noxious Vapors*.

OFFICERS.

Public officer serving process justified in using force necessary to overcome unlawful resistance.—*Hager v. Danforth*, 81.

Protected from action for making arrest, although warrant is void, if regular on its face.—*Rice v. Coolidge*, 14.

Warrant regular on its face is sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 216.

Not protected in making arrest by warrant void on its face.—*Gelzenleuchter v. Niemeyer*, 88.

Officer has no power to arrest, without a warrant, for a past offense, not a felony, upon information or suspicion thereof.—*Quinn v. Heisel*, 96.

Arrest by officer without a warrant is not justified by a threat or other indication of a breach of the peace unless the facts warrant a belief that the arrest is necessary to prevent the commission of the offense, without reference to any past similar offense of which the person may have been guilty before the officer's arrival.—*Quinn v. Heisel*, 96.

Words not in themselves actionable may be actionable as causing special damage, when spoken of one holding a public office, by exposing him to the hazard of losing his office; but no action can be maintained for such words spoken after the office had expired.—*Forward v. Adams*, 116.

When a duty is imposed by statute upon a public officer, any person having a special interest in the performance thereof may sue for a breach thereof causing him damage.—*Willy v. Mulledy*, 16.

Public officer not liable to civil action for judicial determination, however erroneous or malicious, if he had jurisdiction of the case and was authorized to determine it.—*Bradley v. Fisher*, 206; *Weaver v. Devendorf*, 211.

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or deduction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.—*Weaver v. Devendorf*, 211.

Where the duty is imposed by law on the mayor and common council of a city to make and repair sewers in the city, the duty of determining where sewers shall be located and their dimensions is, in its nature, judicial, and an entire omission to construct a sewer, or a failure to make it of sufficient capacity, creates no liability on the part of the city.—*McCarthy v. City of Syracuse*, 212.

But where a sewer has been determined upon and is constructed, the duties of constructing it properly and keeping it in good condition and repair are ministerial, and negligence in the performance of these duties will render the city liable for damages resulting therefrom.—*McCarthy v. City of Syracuse*, 212.

A sheriff or constable who, under an execution, seizes and sells property not belonging to the judgment debtor, though in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.—*Boulware v. Craddock*, 214.

Levy of execution by breaking outer door of dwelling of execution debtor invalid, and the fact that the sheriff making such levy sold the goods and paid the proceeds to the execution creditor is not available to him in mitigation of damages.—*Welsh v. Wilson*, 215.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, although selected by him and subject to his orders.—*Keenan v. Southworth*, 214.

OPINION.

A statement by a warehouseman in a circular soliciting patronage that the exterior of his warehouse is fire-proof is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fire-proof, may recover from the warehouseman for the loss so incurred.—*Hickey v. Morrell*, 260.

Statements amounting merely to expressions of opinion not, in general, ground of action for fraud; but where they are to be regarded as affirmations of fact, then, if false, an action can be maintained on them.—*Hickey v. Morrell*, 262.

See *Expert Testimony*.

PARENT AND CHILD.

Corporal punishment of child by parent in a reasonable manner justifiable.—*Sheehan v. Sturges*, 81.

Action maintainable by father for seduction of minor daughter, although at the time she is in the employ of and residing with another, without any intention to return to her father, if the father has not relinquished his legal right to her services.—*Mulvehall v. Millward*, 218.

PASSAGE-WAY.

Using violence to another to force a passage, in a rude, inordinate manner, or any struggle about a passage to a degree that may do hurt, is a battery.—*Cole v. Turner*, 72.

Obstruction in one direction only, leaving the way open in another direction, not an imprisonment.—*Bird v. Jones*, 82.

PASSENGERS.

Regulation by a railroad company that a passenger, who fails, before leaving its trains or premises, to produce a ticket or pay his fare, shall be detained until he does so, is illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 86.

May be expelled by railroad company from its train for wanton refusal to comply with rule requiring surrender of tickets on the train.—*Illinois Cent. R. Co. v. Whittemore*, 79; *Lynch v. Metropolitan El. Ry. Co.*, 87.

Detention of passenger by carrier, for the purpose of enforcing payment of fare, illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 86.

PERJURY.

Rule that there can be no conviction of perjury on unaided testimony of one witness is applicable only to criminal proceedings.—*Rice v. Coolidge*, 15.

One who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party, is liable to an action therefor by the person whose character is so defamed.—*Rice v. Coolidge*, 13.

PHYSICIANS.

To say of a physician, in regard to his treatment of children not over three years of age, that he killed them by giving them teaspoonful doses of calomel, is actionable *per se*, as imputing to him gross ignorance of his profession; damage being presumed from the nature of the charge.—*Secor v. Harris*, 119.

PLEADING.

Where injury to plaintiff is the natural and necessary consequence of the acts charged in his declaration, special damages need not be alleged.—*Rice v. Coolidge*, 13.

Allegations, in the same count of a declaration, that defendants procured and suborned several witnesses to testify falsely to defamatory matter concerning plaintiff, do not set forth more than one cause of action, where the different acts are alleged to have been all parts of one scheme.—*Rice v. Coolidge*, 13.

Recovery must be on proof of allegations, not of an independent cause of action.—*Guest v. Reynolds*, 3.

POISONS.

Dealer in medicines, selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 65.

POLICE POWER.

Legislature may authorize use of bells, whistles, etc., by employers for purpose of giving notice to their workmen, under regulation of municipal authorities, although thereby injury is caused to individuals, such as a court of equity would restrain. —*Sawyer v. Davis*, 186.

POSSESSION.

Defense of possession of property a justification of assault and battery. —*Scribner v. Beach*, 75; *Commonwealth v. Donahue*, 77.

Property wrongfully taken may be recovered by use of reasonable force. —*Commonwealth v. Donahue*, 77.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is in the actual and exclusive occupation of the owner's tenant, the owner cannot maintain the action. —*Halligan v. Chicago & R. I. R. Co.*, 154.

A person cannot maintain trespass for taking personal property, unless at the time of the taking he had either actual or constructive possession or a right to the immediate possession. —*Lunt v. Brown*, 196.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time. —*Lunt v. Brown*, 195.

The owner of a dog loaned by him to another may maintain trespass for the killing of the dog by a third person while so loaned. Actual possession is not necessary to the maintenance of the action. —*White v. Brantley*, 194.

Trover will not lie for the conversion of personal property unless at the time of the conversion the possession or right to the immediate possession was in plaintiff. —*Gordon v. Harper*, 201.

PRESCRIPTION.

Is founded upon presumption of former grant. —*Thurston v. Hancock*, 24.

Easement of light and air not acquired by prescription of 20 years. —*Guest v. Reynolds*, 3; *Miller v. Woodhead*, 4.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick-kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln. —*Campbell v. Seaman*, 164.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription. —*Campbell v. Seaman*, 164.

Tenant or owner not obliged to fence against adjoining owner or occupier, at common law, except by prescription; and, in that case, only against cattle rightfully in the adjoining close. —*Lawrence v. Combs*, 163.

PRESUMPTIONS.

Common law presumed to prevail in a state the law of which is not proved; but no presumption that the statutes of other states are similar to those of the state in which action is pending. —*Leonard v. Columbia Steam Nav. Co.*, 266.

The presumption of negligence or *prima facie* liability of the owner of a vicious animal by which another person is injured, arising from the fact of its vicious propensity and the owner's knowledge thereof, cannot be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal. —*Muller v. McKesson*, 192.

In such a case as the speaking of words charging a physician with gross ignorance and unskill-

fulness in his profession, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting the presumption into proof; and damage is presumed to result from the speaking of the words. —*Secor v. Harris*, 119.

In an action of trover for the removal by defendant from a jewel of precious stones, the value of which is not known, and which defendant does not produce, the strongest presumption is against him, and the measure of damages is the value of the best stones that would fit the socket. —*Armory v. Delamirie*, 201.

PRINCIPAL AND AGENT.

Where an agent parts with the property of his principal in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion. —*Lavery v. Snethen*, 197.

An agent who, having received a chattel from a fellow-employee with directions not to deliver it to the owner until certain storage charges are paid, refuses to deliver it to the owner on demand because the latter will not pay such charges, neither he nor his principal having any right to impose such a condition, is liable to the owner for a conversion. —*Singer Manuf'g Co. v. King*, 205.

PRIVACY.

Action not maintainable for disturbance of privacy by window overlooking adjacent land. —*Guest v. Reynolds*, 3; *Miller v. Woodhead*, 4.

PRIVILEGED COMMUNICATIONS.

Defamatory words published, spoken in the course of judicial proceedings, are not actionable if they are applicable and pertinent to the subject of inquiry. —*Rice v. Coolidge*, 14.

As to slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action, the privilege is absolute, however malicious the intent, or however false the charge may have been. —*Moore v. Manufacturers' Nat. Bank*, 145.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant. —*Moore v. Manufacturers' Nat. Bank*, 145.

Confidential advice or communication to persons asking therefor, or having a right to expect it, not ground for action of slander or libel unless malice in fact be shown. —*Bromage v. Prosser*, 129.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another, nor because they are uttered after the most urgent solicitation, nor because the interview in which they are uttered is obtained at the instance of the person slandered. —*Byam v. Collins*, 139.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of anything known to the writer concerning any young man the person addressed "went with," or any young man in the place. —*Byam v. Collins*, 139.

Information given to the governor of a state for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but if the communication contains defamatory matter, and is unnecessarily published

to others, such publication is not privileged.—*Woods v. Wiman*, 144.

A communication, by proprietors of a mercantile agency, to their subscribers, of a report of the failure of certain merchants, is privileged only when made in good faith, to those having an interest in the information.—*Sunderlin v. Bradstreet*, 142.

See *Libel*; *Slander*.

PRIVITY.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 62.

Dealer in medicines, selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 65.

PROBABLE CAUSE.

Probable cause is reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged.—*Foshay v. Ferguson*, 100.

Probable cause, which will justify a criminal accusation, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. It does not depend upon the guilt or innocence of the accused, or upon the fact whether a crime has been committed.—*Carl v. Ayers*, 95.

To sustain an action for malicious abuse of process of the court in order illegally to compel a party to give up his property, it need not be averred that the process so improperly employed was sued out without reasonable or probable cause.—*Grainger v. Hill*, 107.

PROCESS.

Use of force by officer necessary to overcome unlawful resistance to service of process justifiable.—*Hager v. Danforth*, 81.

Not lawful for officer, in order to serve civil process, to break open outer door of dwelling of the party, although such dwelling is also used by the party for transaction of business.—*Welsh v. Wilson*, 215.

Breaking of inner door, by officer, to serve process, justifiable.—*Williams v. Spencer*, 161.

A warrant regular on its face is a sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 216.

Warrant void on its face not a protection to officer making arrest under it.—*Gelzenleuchter v. Niemeyer*, 88.

Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not, in some material respect, comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential.—*Fischer v. Langbein*, 91.

Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case.—*Fischer v. Langbein*, 91.

Order or process based on a decision of the court involving the exercise of the judicial function, although afterwards set aside as erroneous, is not void, and does not subject the party procuring it to an action for damages thereby inflicted.—*Fischer v. Langbein*, 90.

Liability for arrest under void process attaches when wrong is committed, without such process

being vacated or set aside; but process merely irregular must be vacated or annulled before an action can be maintained for damages from its enforcement.—*Fischer v. Langbein*, 90.

Arrest of right person under wrong name, through misnomer in the process, without an allegation that the true name is unknown, is false imprisonment.—*Gelzenleuchter v. Niemeyer*, 90.

One who instigates and procures an officer to arrest another under a void warrant is liable to an action therefor, although the officer is protected.—*Rice v. Coolidge*, 14.

Action maintainable for malicious abuse of process.—*Grainger v. Hill*, 107.

Failure of plaintiff in civil action to have writ returned, or to appear at the court to which it is returnable, a final determination of the action.—*Cardinal v. Smith*, 102.

Promissory Notes.

See *Negotiable Instruments*.

PROPERTY.

Owner of land has an absolute property in surface water thereon before it leaves the land and becomes part of a definite water-course.—*Barkley v. Wilcox*, 172.

Riparian owner has no property in the water of the stream, but a simple use of it while it passes.—*Clinton v. Myers*, 173.

In subterranean waters is presumed to be in owner of the fee.—*Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 26.

Light and air not subjects of property beyond moment of actual occupancy.—*Guest v. Reynolds*, 1.

Defense of property a justification of an assault and battery, unless unreasonable force is used.—*Scribner v. Beach*, 75; *Commonwealth v. Donahue*, 77.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.—*Armory v. Delamirie*, 201.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.—*Campbell v. Seaman*, 164.

PROXIMATE OR REMOTE CAUSE.

Action for tort not maintainable for remote, contingent, or indefinite damages.—*Lamb v. Stone*, 9, 10; *Clark v. Chambers*, 32; *Vandenburgh v. Truax*, 37; *Lowery v. Manhattan Ry. Co.*, 38; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 41; *Moody v. Baker*, 44; *Bowen v. Hall*, 46.

It seems that the liability arising from unlawful acts, negligence, or omissions of duty is confined to those consequences only which, in the ordinary course of things, were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions.—*Clark v. Chambers*, 35.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Van denburgh v. Truax*, 37.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attendant circumstances. When there is no intermediate efficient cause, disconnected from the primary fault, and self-operating, which produced the injury, the original wrong must be considered as reaching to the effect, and proximate to it.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 41.

Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.—Bowen v. Hall, 47.

Cancer of the breast, if found to be the result of an injury to plaintiff caused by defendant's negligence, may be considered in estimating damages in an action for such injury.—Baltimore City Pass. Ry. Co. v. Kemp, 54.

Where fire is allowed to fall from a locomotive of an elevated railway on a horse and his driver in the street below, the immediate running away of the horse and his collision with a person on the sidewalk are natural and probable consequences, and the wrongful act is the proximate cause of the injury to such person, notwithstanding error of judgment of the driver in endeavoring to manage and control the horse.—Lowery v. Manhattan Ry. Co., 38.

An insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, for the loss thereby caused the company, such loss being too remote and indirect.—Mobile Life Ins. Co. v. Brame, 247.

Action not maintainable by one party to a contract against a third person persuading the other party to the contract not to perform it.—Mobile Life Ins. Co. v. Brame, 243.

Action not maintainable by contractor for support of town paupers against a person inflicting personal injury upon such a pauper, on the ground that thereby the contractor was subjected to extra expenditure.—Mobile Life Ins. Co. v. Brame, 243.

Witness not liable in damages for evidence given by him in a suit, although false, by which another is injured.—Mobile Life Ins. Co. v. Brame, 243.

Remote negligence on the part of a plaintiff is no answer to his action for an injury, the proximate cause of which is attributable to want of proper care on defendant's part.—Davies v. Mann, 225.

PUBLICATION.

To sustain an action for slander, the defamatory words must have been spoken in the presence or hearing of some person other than the plaintiff.—Terwilliger v. Wands, 124; Shefill v. Van Deusen, 130.

That the words were spoken in a public place is immaterial.—Shefill v. Van Deusen, 130.

Where a letter, containing defamatory matter, is dictated by the author to a clerk, who takes it down in short-hand, and then writes it out in full by means of a type-writing machine, and the letter thus written is copied by another clerk in a copying-press, there is a publication of the letter to both, and the occasion is not privileged.—Pullman v. Walter Hill & Co., 131.

And where such letter is sent by the author in an envelope addressed to the firm, and is opened by a clerk of the firm, in the ordinary course of business, and read by other clerks of the firm, there is a publication of the letter to such clerks, and the occasion is not privileged.—Pullman v. Walter Hill & Co., 131.

Information given to the governor of the state for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.—Woods v. Wiman, 144.

PUNISHMENT.

Of pupil by teacher, in a reasonable manner, justifiable.—Sheehan v. Sturges, 80.

QUESTIONS OF LAW OR OF FACT.

What is the proximate cause of an injury is ordinarily a question for the jury.—Milwaukee & St. P. Ry. Co. v. Kellogg, 43.

What is reasonable force, which may be used in retaking possession of property wrongfully taken by another, is a question of fact for a jury.—Commonwealth v. Donahue, 77.

Negligence, in ordinary cases, a question for the jury, but may be a question for the court where there is no conflict of testimony, and the standard of duty or the rights of the parties have been judicially defined.—Gramlich v. Wurst, 7.

Whether a servant, for whose tortious act suit is brought against his master, was, in doing such act, while apparently engaged in executing the master's orders, in fact pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, is ordinarily a question for the jury on all the facts and circumstances proved.—Rounds v. Delaware, L. & W. R. Co., 237.

Where, on the evidence in an action for slander for words spoken in answer to an inquiry, it is a question of fact whether defendant understood the person making such inquiry as asking for information to regulate his own conduct, this should be submitted to the jury for consideration before they are to consider the question of malice in answering.—Bromage v. Prosser, 123.

In a civil action for libel in the state of New York, where the publication is admitted and the words are unambiguous, the question of libel or no libel is one of law, which the court must decide.—Moore v. Francis, 126.

Whether a libelous communication is privileged is a question of law.—Byam v. Collins, 139.

Whether a regulation of a railroad company requiring passengers to surrender their tickets before leaving the trains is reasonable is a question for the court, either with or without testimony on the subject; to submit it to the jury is error.—Illinois Cent. R. Co. v. Whittemore, 79; Lynch v. Metropolitan El. Ry. Co., 87.

The reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact.—Sheehan v. Sturges, 80.

RAILROADS.

Incidental injury to owner of property near a railroad, caused by the necessary noise, vibration, dust, and smoke from passing trains, which would amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form.—Sawyer v. Davis, 186.

The act of a workman on a railroad in riding on the pilot of an engine instead of in the car provided for workmen, although he was informed of the danger of doing so, is negligence on his part, contributing to his injury by a collision of the engine with cars standing on the track, sufficient to defeat a recovery by him against the railroad company therefor.—Baltimore & P. R. Co. v. Jones, 223.

The conduct of a boy nearly 10½ years old, of average intelligence, familiar in a general way with the working of a railroad turn-table, knowing that it was dangerous to play upon it, and that so doing was forbidden by the railroad company, and having been warned by his father not to go upon it, who nevertheless engages with oth-

er boys in swinging upon it while in motion, and is injured thereby, is such contributory negligence as will defeat a recovery for such injury, although he may not have been of sufficient age and discretion to understand the full extent of the danger.—*Twist v. Winona & St. P. R. Co.*, 226.

A person seeing a small child on a railroad track, in extreme peril from a rapidly approaching train, owes to the child the duty to rescue it if he can do so without incurring great danger to himself; and the law will not impute negligence to an effort by him to rescue the child, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 236.

A trespasser upon the cars of a railroad train is entitled to be protected against unnecessary injury by the railroad company or its servants in exercising the right of removing him.—*Rounds v. Delaware, L. & W. R. Co.*, 239.

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.—*Morgan v. Vale of Neath Ry. Co.*, 244.

RELIGIOUS SOCIETIES.

Loss of membership, with no material advantages attaching thereto, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 28.

REMEDIES.

New remedy adopted, to prevent failure of justice or to enforce settled principles of law; but not where redress may be had by any of the forms of action already known and practiced.—*Lamb v. Stone*, 9; *Rice v. Coolidge*, 13, 15.

Action may be either *ex contractu* or *ex delicto*, for breach of right or duty created by law, the performance of which has been assumed by contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

Remote Damages.

See *Proximate or Remote Cause*.

RESISTING PROCESS.

Officer justified in using force necessary to overcome unlawful resistance to process.—*Hager v. Danforth*, 81.

REVERSIONS.

Action maintainable for injury to reversionary right.—*Webb v. Portland Manuf'g Co.*, 20.

Riparian Rights.

See *Water-Courses*.

ROOF.

Of extension of building with unprotected skylight below windows of rooms let by owner, not a structure dangerous to tenant of rooms.—*Miller v. Woodhead*, 5.

SALE.

Where there is a mistake between the seller and purchaser as to the article sold, the seller supposing he has sold one article while the purchaser supposes he has bought another, of which

he takes possession, he will be liable in trespass.—*Hobart v. Hagget*, 195.

When an article is offered for sale, a material latent defect must be disclosed, or the sale will be avoided.—*Grigsby v. Stapleton*, 259.

One who sells cattle, which he knows have a contagious disease, not easily detected except by those acquainted with it, for a sound price, to a purchaser having no knowledge of the fact, if he does not disclose the fact to the purchaser, is guilty of fraudulent concealment of a latent defect, which will defeat an action for the price. Under such circumstances the rule *caveat emptor* does not apply.—*Grigsby v. Stapleton*, 258.

When the real quality of property sold is obvious to ordinary intelligence, and the vendor and vendee have equal knowledge or equal means of acquiring information, and the truth or falsity of representations made by the vendor as to its quality may be ascertained by the vendee by the exercise of ordinary inquiry or diligence, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, which every prudent person ought to make, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.—*Long v. Warren*, 263.

Action not maintainable by purchaser of a farm against the vendor for false representations by the latter, to induce the purchase, in regard to the absence of a noxious grass from the farm, where it appears that any attempt to find such grass on the farm, made before the purchase, would have disclosed its existence.—*Long v. Warren*, 263.

Representations made to a father to induce him to purchase a gun for the use of his son, known by the vendor making them to be false, by which the son is induced to use the gun, operate as a distinct fraud on the son, and he may maintain an action against the vendor for injuries sustained in consequence thereof.—*Winterbottom v. Wright*, 64.

SCHOOLS.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as to the offense.—*Sheehan v. Sturges*, 80.

In an action against a teacher for assault and battery in whipping a pupil, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.—*Sheehan v. Sturges*, 80.

The reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact.—*Sheehan v. Sturges*, 80.

SEDUCTION.

Action maintainable by father for seduction of minor daughter, although at the time she is in the employ of and residing with another, without any intention to return to her father, if the father has not relinquished his legal right to her services.—*Mulvehall v. Millward*, 218.

See *Criminal Conversation*.

SELF-DEFENSE.

Justifies assault and battery.—*Scribner v. Beach*, 75; *Commonwealth v. O'Malley*, 77; *Commonwealth v. Donahue*, 77.

Sheriffs.

See *Officers*.

SHIPPING.

Where, by a collision between two steam-ships, through negligence of the masters and crews of

both, a person on board one of them, having nothing to do with the negligent navigation, is drowned, an action may be maintained against the owners of the other vessel for damages for his death, under a statute giving a right of action to personal representatives of a deceased person for injuries causing his death.—*Mills v. Armstrong*, 233; *The Bernina*, Id.

SKY-LIGHTS.

In roof of extension of building, below windows of rooms let by owner, not a structure dangerous to tenant of rooms, even after removal of wire screen intended to protect the glass.—*Miller v. Woodhead*, 5.

SLANDER.

Slandorous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced some special damage.—*Moore v. Francis*, 126.

Words imputing a criminal offense punishable corporally are actionable *per se* in England, even though such offense be not punishable by indictment.—*Webb v. Beavan*, 112.

Words imputing a charge which, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, are in themselves actionable.—*Young v. Miller*, 111.

Where the removal of a landmark is, by statute, indictable as a misdemeanor, and punishable by fine and imprisonment in the county jail, as it also involves moral turpitude, words charging a person with that offense are actionable *per se*.—*Young v. Miller*, 111.

Words imputing charge of swindling do not necessarily imply a crime, and are not actionable *per se*.—*Chase v. Whitlock*, 113.

Action maintainable for words imputing crime, though spoken by way of interrogation only, if, according to the natural and fair construction of the language used, in connection with the circumstances, the hearers had a right to believe that defendant intended to charge plaintiff with the commission of a criminal offense.—*Gorham v. Ives*, 114.

To say that a person is a "returned convict," thereby imputing an offense punishable by transportation, is actionable *per se*; as, although the punishment has been suffered, the obloquy remains.—*Fowler v. Dowdney*, 114.

Words imputing a crime in another state, which is not punishable in the state in which such words were spoken, may be actionable in the latter state.—*Van Ankin v. Westfall*, 113.

Words imputing crime, but spoken and understood with reference to transactions which were known not to amount to the charge the words import, are not actionable.—*Van Rensselaer v. Dole*, 115.

To say of a man that he had the venereal disease, and, having married, communicated it to his wife, and that he was "the guilty one," does not necessarily import the commission by him of the criminal offense of adultery or fornication, so as to render the words actionable as imputing such offense.—*Golderman v. Stearns*, 116.

To say of a man that he has the venereal disease is actionable, as tending to exclude him from society; but if, when the charge was made, he had such disease, the truth of the charge is a justification.—*Golderman v. Stearns*, 116.

Imputing unchastity to a woman not actionable at common law unless special damage be shown.—*Roberts v. Roberts*, 28.

Words not in themselves actionable may be actionable as affecting the person of whom they are spoken in his office, profession, trade, employment, etc.—*Forward v. Adams*, 116; *Ireland v. McGarvish*, 118; *Secor v. Harris*, 119.

Ground of action for speaking words not actionable in themselves, but only in consequence of the special character of the party of whom they are spoken, is that such party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office in consequence of the slanderous words; not that his general reputation is affected by them.—*Forward v. Adams*, 116.

Words not actionable in themselves, but only in consequence of the special character of the person of whom they are spoken, are not actionable when spoken after such person has ceased to sustain that special character.—*Forward v. Adams*, 116.

To say of a person formerly appointed to negotiate a treaty with Indians that he bribed them to sign the treaty is not actionable except as affecting him in such office, and no action can be maintained therefor where the office had expired before the words were spoken.—*Forward v. Adams*, 116.

To render words actionable on account of the official or professional character of the person of whom they are spoken, it is not enough that they tend to injure him in his office or calling; they must relate to his official or business character, and impute misconduct to him in that character.—*Ireland v. McGarvish*, 118.

To charge a physician with gross ignorance and unskillfulness in his profession, though in but a single act, is actionable *per se*; damage is presumed from the very nature of the charge.—*Secor v. Harris*, 119.

Damages caused by the repetition of defamatory words, without proper occasion for repeating them, are not the natural and legal consequence of the first speaking of them, and the person so repeating them is alone liable for such damages.—*Terwilliger v. Wands*, 121.

Illness and inability to labor, caused by the effect on one's mind of defamatory words reported to have been spoken of him, are not special damages for which he can maintain an action of slander.—*Terwilliger v. Wands*, 121.

Only injuries affecting the reputation constitute such special damage as will sustain an action for speaking words not in themselves actionable. The words must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result.—*Terwilliger v. Wands*, 121.

Loss of membership in religious society, to which no material advantages are attached, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 28.

Action maintainable for words spoken of plaintiff by defendant, whereby a contract of marriage between plaintiff and another person was broken off by the latter, although such words are not in themselves actionable, and although plaintiff has a remedy against such other person for breach of the contract.—*Moody v. Baker*, 44.

No action can be maintained for the speaking of defamatory words to the person of whom they are spoken only, no other person being present or within hearing.—*Terwilliger v. Wands*, 124; *Sheffill v. Van Deusen*, 130.

That the defamatory words were spoken in a public place is immaterial.—*Sheffill v. Van Deusen*, 130.

Query, whether lunatic liable for slander?—*Morain v. Devlin*, 51, note.

Confidential advice or communication to persons asking therefor, or having a right to expect it, not ground for action of slander or libel unless malice in fact be shown.—*Bromage v. Prosser*, 129.

As to slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, the privilege is absolute, however malicious the intent, or however false the charge may have been.—*Moore v. Manufacturers' Nat. Bank*, 145.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent.

voluntarily made, and which the party making them could not reasonably have supposed to be relevant.—*Moore v. Manufacturers' Na. Bank*, 145.

A communication affecting the character of a servant, made by his former master to another whose service he is about to enter, although made voluntarily, if in good faith, without malice, in the belief that it is done in the discharge of a duty, and with a full conviction of its truth, is privileged, and damages cannot be recovered therefor without a finding of malice.—*Fresh v. Cutter*, 136.

But the speaking of such words, though with a belief in their truth, to a person other than the new master, would not be privileged.—*Id.*

Malice in law is inferred, ordinarily, from the speaking of slanderous words, wrongfully and intentionally; but where, on account of the cause of speaking, it is *prima facie* excusable, malice in fact must be proved by plaintiff.—*Bromage v. Prosser*, 128.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.—*Byam v. Collins*, 139.

Slander against a married woman, of such a kind as to cause injury to her husband's business, as a natural consequence, gives the husband a cause of action.—*Van Horn v. Van Horn*, 110.

In an action for slander in speaking words which are slanderous only by reference to facts and circumstances set forth in plaintiff's declaration, the *colloquium* or averment that the words were spoken of and concerning such circumstances must extend to the whole of the prefatory inducement necessary to render the words actionable. An omission in this respect cannot be aided by mere innuendoes, nor by averments that defendant had knowledge of the particular circumstances stated.—*Brettun v. Anthony*, 147.

A plea in an action for slander, which merely avers that defendant spoke the words to a neighbor who was about to employ plaintiff, in the *bona fide* performance of a duty, without malice, and with an honest belief that they were true, is bad as a plea of privileged communication, because not sufficiently specific.—*Fresh v. Cutter*, 136.

Where, on the evidence in an action for slander for words spoken in answer to an inquiry, it is a question of fact whether defendant understood the person making such inquiry as asking for information to regulate his own conduct, this should be submitted to the jury for consideration before the question of malice in answering.—*Bromage v. Prosser*, 128.

Evidence of the truth of the charge for making which an action for slander is brought is not admissible in mitigation of damages.—*Van Ankin v. Westfall*, 113.

Action maintainable for untrue statement disparaging goods of another, made without lawful occasion, and causing him special damage.—*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, 11.

SLANDER OF TITLE.

To maintain an action for slander of title, the words must not only be false, but must be uttered maliciously, and be followed as a natural and legal consequence by pecuniary damage to plaintiff, which must be specially alleged and proved.—*Kendall v. Stone*, 149.

Although one who has entered into a contract to purchase land is influenced to desire to withdraw therefrom by statements as to the vendor's title made by a third person, if the vendor assents to a rescission of the contract, he cannot recover damages from the third party for the loss of the sale, as it is not the legal consequence of the words spoken.—*Kendall v. Stone*, 149.

SPRING GUNS.

Owner of land planting spring guns is liable to person injured thereby, while merely stray-

ing on the land.—*Gramlich v. Wurst*, 5; *Clark v. Chambers*, 33, 34.

Springs.

See *Subterranean Waters*.

SQUIB.

Action maintainable for personal injury from lighted squib first thrown by defendant, although injury would not have happened without intervention of others.—*Clark v. Chambers*, 33; *Vandenburgh v. Truax*, 37; *Morain v. Devlin*, 50.

Statute of Frauds.

See *Frauds, Statute of*.

STATUTES.

Action maintainable for violation of statutory duty.—*Willy v. Mulledy*, 16.

A statute which authorizes a thing to be done which can be done without creating a nuisance will not be deemed to authorize a nuisance.—*Sawyer v. Davis*, 186.

Statutes of one state can have no operation in another where similar statutes do not exist; but a right of action given by a statute of one state may be enforced in the courts of another state having a substantially similar statute, as if such right of action existed by the common law of both states.—*Leonard v. Columbia Steam Nav. Co.*, 265.

No presumption that statutes of different states are the same.—*Leonard v. Steam Nav. Co.*, 266.

STEAM-BOILERS.

Owner of land not liable for injuries caused by the explosion of a steam-boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.—*Marshall v. Welwood*, 221.

STEAM-WHISTLES.

Use of steam-whistles by employers for purpose of giving notice to their workmen, although such as to cause injury to individuals which a court of equity would restrain, may be authorized by legislature, subject to regulation by municipal authorities.—*Sawyer v. Davis*, 186.

SUBORNATION OF PERJURY.

Action maintainable against one who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party.—*Rice v. Coolidge*, 13.

It seems that in an action for suborning witnesses to swear falsely to defamatory statements concerning plaintiff, the words spoken or written need not be set out with the fullness required in actions of slander and libel; it is sufficient to set out their substance.—*Rice v. Coolidge*, 15.

SUBTERRANEAN WATERS.

Digging on one's own land, although it intercepts percolating waters which supply the spring of another, is not a cause of action.—*Barkley v. Wilcox*, 172.

Opening wells and drawing water therefrom, not a ground for action by owner of adjoining land, although the supply of water to his wells is thereby diminished.—*Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 26.

SURFACE WATERS.

Owner of land has an absolute property in surface water thereon before it leaves the land and becomes part of a definite water-course.—*Barkley v. Wilcox*, 172.

The owner of land, which is so situated that the surface waters from the land above naturally descend upon and pass over it, may in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.—*Barkley v. Wilcox*, 170.

SWINDLING.

Words imputing charge of swindling do not necessarily imply a crime, and are not actionable *per se*.—*Chase v. Whitlock*, 113.

TAXATION.

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or deduction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.—*Weaver v. Devendorf*, 211.

Tenancy in Common.

See *Joint Tenancy and Tenancy in Common*.

TENEMENT-HOUSES.

Owner liable for defective condition, although insane.—*Morain v. Devlin*, 50.

Failure of owner of tenement-house to comply with statute requiring fire-escapes to be provided therefor is a breach of duty for which he is liable to a tenant for damages thereby caused to the latter.—*Willy v. Mulledy*, 16.

TORT.

No accurate and perfect definition of word "tort."—*Rich v. New York Cent. & H. R. R. Co.*, 58.

Violation of legal right or legal duty necessary to constitute a tort.—*Guest v. Reynolds*, 1; *Müller v. Woodhead*, 4; *Gramlich v. Wurst*, 5; *Rich v. New York Cent. & H. R. R. Co.*, 60.

Violation of merely moral right or duty does not constitute a tort.—*Lamb v. Stone*, 8.

Wrongful intent not essential to constitute tort, in cases of trespass.—*Bessey v. Olliot*, 49; *Weaver v. Ward*, 49; *Guille v. Swan*, 49.

No liability in tort for purely accidental injuries.—*Brown v. Kendall*, 51.

Action of tort maintainable for breach of right or duty created by law, though its performance has been assumed by contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

Violation of duty of care on the part of a common carrier of passengers, towards a passenger, is a tort.—*Baltimore City Pass. Ry. Co. v. Kemp*, 54.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 62.

Where, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.—*Thomas v. Winchester*, 65.

Dealer in medicines selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it

was administered, although there was no privity between them.—*Thomas v. Winchester*, 65.

Where, upon a breach of contract, there is not merely a broken promise, but also trust betrayed and confidence abused,—constructive fraud, or a negligence that operates as such,—such fraud or negligence makes the breach of contract actionable as a tort.—*Rich v. New York Cent. & H. R. R. Co.*, 60.

Omission to perform a contract obligation may constitute a tort, where the omission is also an omission of a legal duty, even though such legal duty arises from circumstances not elements of the contract, but merely connected with it and dependent upon it.—*Rich v. New York Cent. & H. R. R. Co.*, 56.

It seems that one who procures another to break a contract by the latter with a third party is responsible for the breach only where malice to such third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—*Van Horn v. Van Horn*, 110.

TREES.

A verbal contract by the owner of land for the sale of trees standing thereon, to be cut and removed by the purchaser, gives the latter an implied license to enter for that purpose; but such license is revocable at any time, except as to an entry for the purpose of removing trees cut before the revocation.—*Giles v. Simonds*, 157.

Trees and vines, although planted merely for ornament or luxury, are entitled to protection by injunction from injury by destructive vapors.—*Campbell v. Seaman*, 164.

One cutting timber on land of another, though without intent to trespass, and by mistake as to the line of division, is liable as a trespasser.—*Hobart v. Hagget*, 195.

TRESPASS.

An entry upon land of another without his permission, express or implied, or the license or authority of law, constitutes a trespass, for which damages are recoverable, though merely nominal.—*Hatch v. Donnell*, 150; *Newkirk v. Sabler*, 151.

Owner of domestic animals liable for injuries committed by them while trespassing on the close of another, irrespective of his knowledge of their vicious propensities; but not liable for injuries by them unless they were trespassing, or he has knowledge of their vicious propensities.—*Van Leuven v. Love*, 152.

One or two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor, although he would be liable for such trespass by cattle rightfully on his land.—*Lawrence v. Combs*, 163.

The owner of an ox which, while being driven along the highway, escapes and enters premises of another adjoining the highway, is not liable for the damages thereby done, unless there was negligence on his part.—*Tillett v. Ward*, 162.

To maintain trespass *de bonis asportatis*, actual forcible dispossession of property is not necessary; any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, will constitute a trespass, though there was no wrongful intent, and the property was taken accidentally or by mistake.—*Dexter v. Cole*, 195.

Plaintiff's sheep, running at large in the highway, became mixed with sheep which defendant was driving to market. Defendant separated all but four of them, which he drove to market with his flock. *Held*, that he was liable in trespass.—*Dexter v. Cole*, 195.

Action maintainable for a trespass without wrongful intent.—*Bessey v. Olliot*, 49; *Weaver v. Ward*, 49; *Guille v. Swan*, 49; *Hobart v. Hagget*, 195.

One cutting timber on land of another, though without intent to trespass, and by mistake as to the line of division, is liable as a trespasser.—Hobart v. Hagget, 195.

One has no right to enter upon land of another for the purpose of taking away a chattel thereon which belongs to him, where there is no license, express or implied, nor any legal excuse, as on the ground of necessity, even though such chattel is unlawfully detained there.—Newkirk v. Sabler, 151.

Entry upon lands of another excusable, if necessary for preservation of life.—Newkirk v. Sabler, 151.

Entry on land of another excusable, if necessary to prevent irremediable loss or destruction of property of third person.—Newkirk v. Sabler, 151; Proctor v. Adams, 159.

Entry on lands of another justified by license, express or implied, though by parol.—Newkirk v. Sabler, 151; Giles v. Simonds, 159.

Entry on lands of another excused by necessity.—Newkirk v. Sabler, 151; Proctor v. Adams, 159; Campbell v. Race, 160.

Breaking of inner door, by officer to serve process, justifiable.—Williams v. Spencer, 161.

The abuse of a license to enter premises given by law makes the party a trespasser *ab initio*; but otherwise where the license to enter was given by the person in possession.—Six Carpenters' Case, 155.

One going into a public tavern and there ordering and drinking wine, does not, by refusing to pay therefor, become a trespasser *ab initio*; mere not doing is no trespass.—Six Carpenters' Case, 155.

Trespass to land an injury to the possession.—Halligan v. Chicago & R. I. R. Co., 154.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is in the actual and exclusive occupation of the owner's tenant, the owner cannot maintain the action.—Halligan v. Chicago & R. I. R. Co., 154.

Trespass to personal property an injury to the right of possession.—Lunt v. Brown, 196.

A person cannot maintain trespass for taking personal property, unless, at the time of the taking, he had either actual or constructive possession or a right to the immediate possession.—Lunt v. Brown, 196.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time.—Lunt v. Brown, 195.

Trespass maintainable by owner of a dog for the killing of it, although it was not at the time in his possession, but loaned to another.—White v. Brantley, 194.

Action maintainable by one tenant in common against another upon an actual ouster.—Murray v. Hall, 157.

A single trespass may be committed on several closes, and one action maintained therefor as one trespass.—Halligan v. Chicago & R. I. R. Co., 154.

TRESPASSERS.

Not entitled to redress for injuries negligently inflicted, unless some legal duty towards them is violated.—Gramlich v. Wurst, 5; Rounds v. Delaware, L. & W. R. Co., 237.

Trespasser upon the cars of a railroad train is entitled to be protected against unnecessary injury by the railroad company or its servants in exercising the right of removing him.—Rounds v. Delaware, L. & W. R. Co., 239.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable for injuries to trespasser falling into excavation.—Gramlich v. Wurst, 5.

Trover.

See *Conversion of Personal Property*.

TRUSTEE PROCESS.

Trustee entitled to equitable set-off for advances made to or debts paid for principal debtor in good faith.—Lamb v. Stone, 10.

UNDERTAKERS.

The business of an undertaker will not be restrained by injunction at the suit of an owner of premises adjoining the place, because such business is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, unless the acts complained of are of such a nature as to affect all reasonable persons similarly situated.—Rogers v. Elliott, 177.

Vendor and Vendee.

See *Sale*.

VIEW.

Obstruction of light, air, and view by owner of adjoining land is not a ground of action unless adverse right to the enjoyment of such privileges has been acquired.—Guest v. Reynolds, 1.

VOID PROCESS.

Not a protection to officer.—Gelzenleuchter v. Niemeyer, 88.

Voters.

See *Elections and Voters*.

WAREHOUSEMEN.

A statement by a warehouseman, in a circular soliciting patronage, that the exterior of his warehouse is fire-proof, is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fire-proof may recover from the warehouseman for the loss so incurred.—Hickey v. Morrell, 260.

Warrant.

See *Process*.

WATERS AND WATER-COURSES.

Uniform or uninterrupted flow not essential to constitute a water-course.—Barkley v. Wilcox, 170.

One of several owners of mills and mill privileges on the same dam is entitled to his proportion of the whole stream at the dam, undivided and undiminished in its natural flow, and may restrain the other owners by injunction from drawing from the head of the pond any part of the water, even a part less than their proportion.—Webb v. Portland Manuf'g Co., 19.

To an action by one of several owners of mills and privileges on the same dam, to restrain the other owners from drawing water from the head of the pond, it is no answer that defendants have improved the supply of water to the pond by a reservoir higher up the stream.—Webb v. Portland Manuf'g Co., 19.

As against a lower riparian owner on a natural water-course, an upper riparian owner of land on both sides of the stream has no right to detain such surplus of the waters thereof as he does not require for present use, until they may be wanted by him in a dry season.—Clinton v. Myers, 172.

It is immaterial that such detention of the water makes the lower riparian owner's rights more valuable, if he insists upon his legal right to the water as it would naturally flow, and such right is of any value to him.—Clinton v. Myers, 172.

In time of drought, riparian owner may detain the water of the stream by a dam for such time as necessary to raise a head sufficient to enable him to use the water for the purpose of his machinery, if the machinery is such as is adapted to the power of the stream at its usual stage.—Clinton v. Myers, 174.

The pollution of a stream of water, so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is an infringement of the rights of other riparian owners, and creates a nuisance which will be enjoined at the suit of those injured.—Merrifield v. Lombard, 175.

Action maintainable for injuries from breach of statutory duty by defendants to maintain works to keep out or carry off water, that being the substantial cause of the mischief, although wrongful acts or negligence of third persons increased or contributed to the damage.—Clark v. Chambers, 35.

Action maintainable for the carrying away of a dam, caused by the giving way of a dam of defendant above it on the same stream, in consequence of his negligence, although the volume and force of the stream were materially increased by the giving way of another dam between them.—Lowery v. Manhattan Ry. Co., 40.

Action maintainable for injuries caused by horses taking fright at a stream of water allowed by defendants to spout up in the road, and falling into a ditch constructed in the road by others as contractors for a sewer, and negligently left by them unfenced.—Clark v. Chambers, 34.

See *Subterranean Waters*; *Surface Waters*.

Wells.

See *Subterranean Waters*.

WINDOWS.

Obstruction of view or light not ground of action, unless adverse right has been acquired.—Guest v. Reynolds, 1.

Disturbance of privacy by overlooking windows not ground of action.—Guest v. Reynolds, 3; Miller v. Woodhead, 4.

WITNESS.

Testimony of experts in the business of fire insurance not admissible on the question of the hazard and exposure of one building to fire from

another, as dependent on the distance between them.—Milwaukee & St. P. Ry. Co. v. Kellogg, 41.

Witness not liable in damages for evidence given by him in a suit, although false, by which another is injured.—Mobile Life Ins. Co. v. Brame, 245.

That witness swearing falsely is protected by his personal privilege from a civil suit therefor does not exempt the person suborning him from liability to one defamed thereby, who was not a party to the action.—Rice v. Coolidge, 13.

WORDS AND PHRASES.

"Conversion" is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.—Lavery v. Snetten, 197.

Damnum absque injuria.—Gramlich v. Wurst, 7; Webb v. Portland Manuf'g Co., 19; Thurston v. Hancock, 26; Winterbottom v. Wright, 65; Castle v. Houston, 134; Campbell v. Seaman, 164; Clinton v. Myers, 174, 175; Marshall v. Wellwood, 222.

Damnum cum injuria.—Lamb v. Stone, 9.

Ex jure nature.—Webb v. Portland Manuf'g Co., 22.

"Imprisonment" includes, besides mere loss of freedom to go where one pleases, restraint within limits defined by an exterior will or power.—Bird v. Jones, 83.

Injuria sine damno.—Dixon v. Clow, 18; Webb v. Portland Manuf'g Co., 19.

"Injury" implies something more than damage.—Brown v. Kendall, 52.

"Malice," in common acceptance, means ill-will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse.—Bromage v. Prosser, 129.

"Ordinary care" means, in general, that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.—Brown v. Kendall, 53.

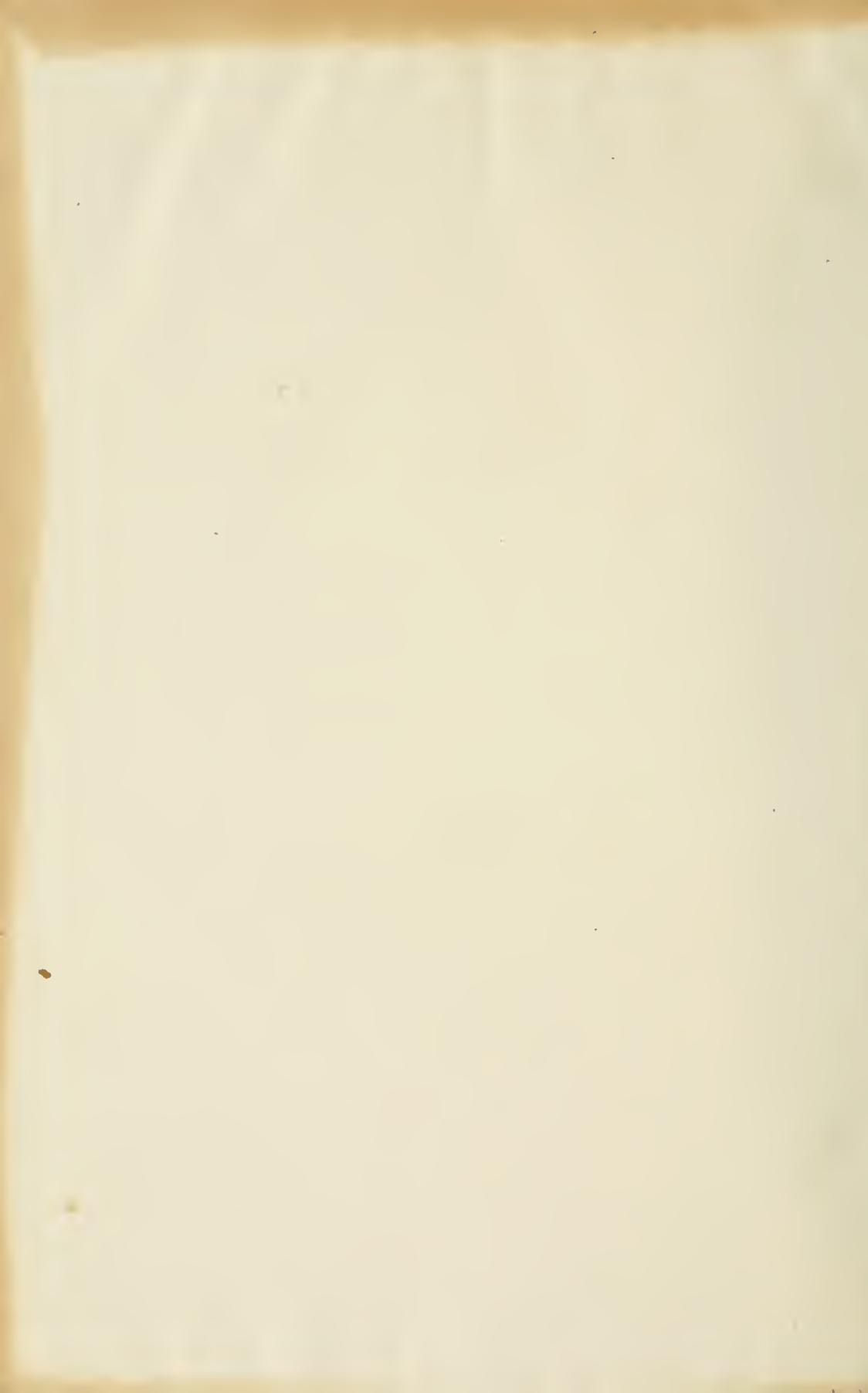
Per my et per tout.—Thurston v. Hancock, 23.

"Tort." No accurate and perfect definition of "tort."—Rich v. New York Cent. & H. R. R. Co., 56.

"Water-course." A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential that the flow should be uniform or uninterrupted.—Barkley v. Wilcox, 170.

Writs.

See *Certiorari*; *Execution*; *Injunction*; *Process*.



UC SOUTHERN REGIONAL LIBRARY FACILITY



D 000 312 212 4

Bowen & Bowen.

